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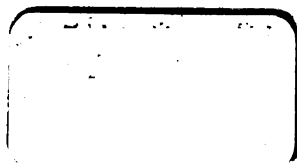
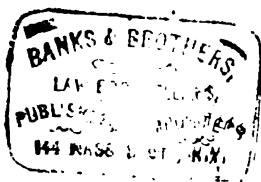
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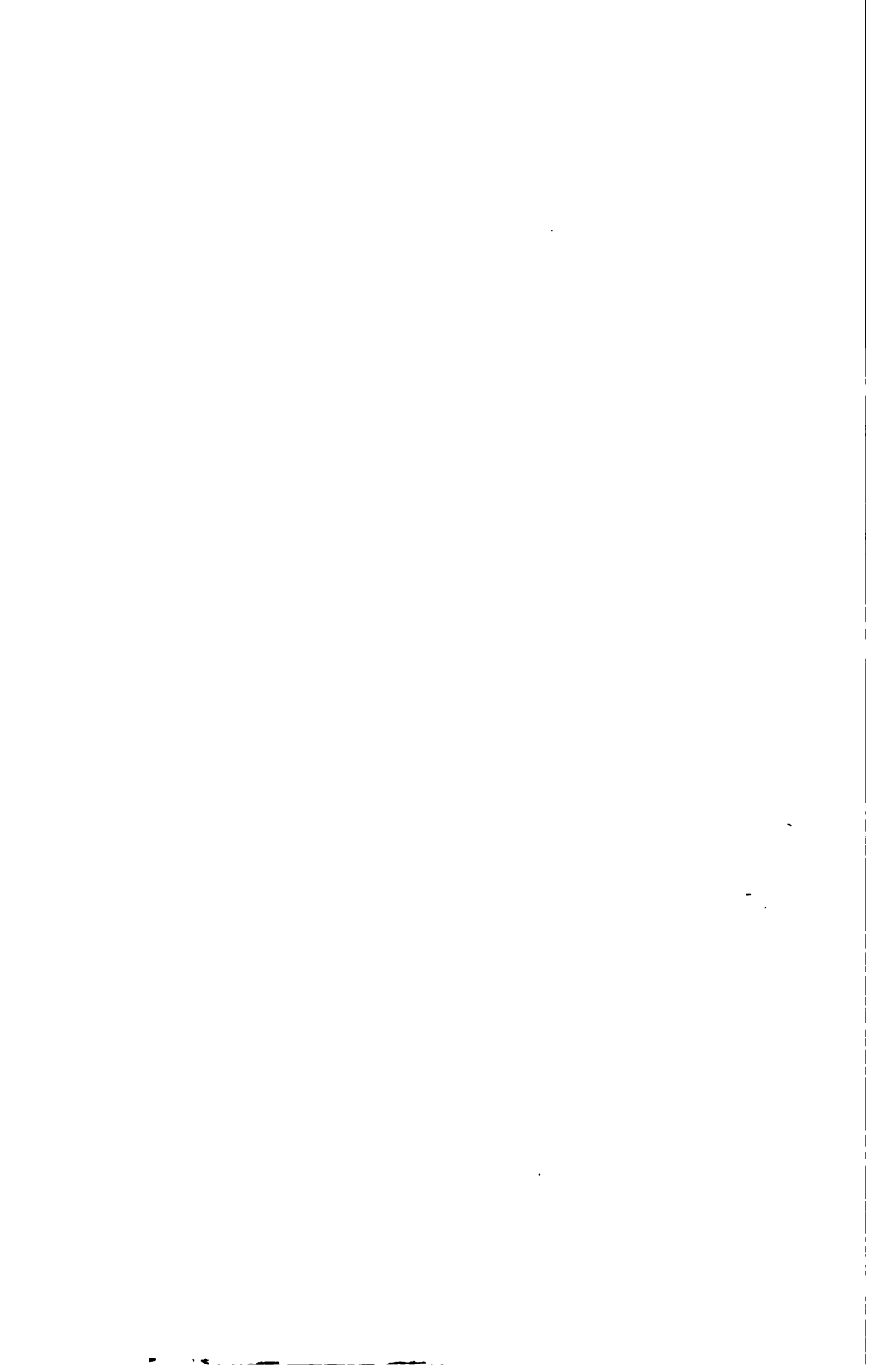












LOWER-CANADA REPORTS.

2801
DECISIONS DES TRIBUNAUX

DU
BAS-CANADA.

REDACTEUR: M. LELIEVRE.

COLLABORATEURS A MONTREAL: MM. BEAUDRY ET ROBERTSON

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**VOLUME XIV.**  
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LOWER-CANADA REPORTS.

DÉCISIONS DES TRIBUNAUX DU BAS-CANADA.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—Sir L. H. LaFontaine, Bart., Juge-en-Chef.
DUVAL, MEREDITH et MONDELET, Juges.

PERRAULT *et vir*..... Appelants.
et

LA BANQUE ONTARIO..... Intimée.

Jugé :—Qu'un transport de créance accepté par le notaire, au nom du cessionnaire, est suffisamment ratifié et parfait par la signification qui en est faite au nom du cessionnaire, et sort son effet du jour de cette signification.

Held :—That the assignment of a debt accepted by the notary, in the name of the assignee, is sufficiently ratified and perfected by the signification which is made in the name of such assignee, and takes effect from the day of such notification.

Jugement rendu le 19 novembre, 1863.

La Banque Ontario avait obtenu jugement contre Ed. Barnard, le 28 février, 1859, à Montréal, pour \$3602, avec intérêts et dépens. Pour en obtenir le paiement elle fit émaner une saisie-arrêt qui fut signifiée le 26 mars, 1860, à John Boston, shérif de Montréal, et John Platt, du même lieu. Boston déclara qu'en sa qualité de shérif, il avait en mains une somme de £414.7.7, qui lui avait été consignée par Platt, comme montant d'un jugement obtenu par Barnard, contre ce dernier, le 30 juin, 1859, et pour paiement duquel les immeubles de Platt étaient alors saisis.

L'appelante intervint sur la saisie-arrêt ainsi faite, et alléqua :

Que, le 2 novembre, 1859, par acte reçu devant Hunter,

et confrère, notaires, Barnard reconnut devoir à l'appelante, pour prêt a lui fait, la somme de \$1125, avec intérêt, et pour sûreté du paiement, il lui transporta, jusqu'à concurrence, partie du jugement qu'il avait obtenu contre Platt, ainsi qu'il est mentionné plus haut. L'appelante n'était pas présente à l'acte de transport quoiqu'il fût dit qu'elle acceptait. Le transport fut ensuite signifié à Platt, le 4 novembre, 1859, avec déclaration que c'était à la requisition de l'appelante.

Que l'exécution procédait ainsi contre le dit Platt, à sa connaissance, au profit de l'appelante et de Barnard.

Que pour éviter l'expropriation, Platt paya, entre les mains du shérif, le montant du jugement £414.7.7.

Que sur cette somme, il était dû à l'appelante comme balance en principal \$1050.80, avec intérêt du 15 nov., 1859.

Elle concluait à être déclarée saisie de la créance de \$1125, à compter de la date de la signification du transport; que la saisie-arrêt faite à la poursuite des intimés fut déclarée nulle, *pro tanto*, et que le shérif fut condamné à lui payer la somme de \$1050.85, avec intérêt, tel que susdit, et elle concluait aux dépens contre les intimés, au cas de contestation.

Les intimés contestèrent l'intervention, niant à l'appelante le droit d'intervenir, et alléguant d'abondant que Platt, par sa déclaration avait reconnu devoir à Barnard, sans reconnaître l'appelante comme sa créancière. Que le transport n'avait pas été signifié à Boston. Que, conséquemment, immédiatement après la consignation des deniers par Platt, Barnard pouvait en exiger la délivrance, et qu'ainsi la saisie-arrêt pratiquée en cette cause devait avoir son effet, l'appelante n'ayant produit son opposition à la délivrance des deniers, entre les mains du shérif Boston, que le lendemain de la signification à lui faite de la saisie-arrêt; que cette opposition venait trop tard, lors même qu'elle pût être considérée comme signification du

transport. Les intimés concluaient au renvoi de l'intervention et au maintien de leur saisie-arrêt.

A l'audience ils firent valoir comme moyen additionnel que le transport fait à l'appelante n'était pas accepté, et était sans valeur.

La Cour de première instance jugea en faveur des intimés, et c'était de ce jugement que l'appelante avait interjeté appel.

MEREDITH, Justice.—It is plain from the return of the Sheriff, that the sum of money mentioned in the declaration of John Boston, is the amount of the judgment in the case No. 493, *Barnard vs. Platt* ; a part of which was transferred to the appellant by the deed of the 2nd November, 1859.

The question, therefore, which we have to determine is this : Had that sum of money been lawfully transferred to the appellant, to the extent claimed by her, before the attachment thereof by the respondent ?

The objection to the transfer in favour of the appellant, is that it has not been lawfully accepted. As to this point, I am of opinion that the acceptance of the notaries set forth in the deed of transfer must be considered as extending to every part of that instrument, exactly in the same way as if the appellant had been personally present at the passing of the deed ; in which case it could not be contended that it would have been necessary for her to repeat her acceptance of each of the covenants made in her favour.

There still however remains the question whether the notary, having power to accept the deed as an obligation, which he certainly had, (1) had also power to accept that part of the deed which was in effect a transfer. Upon this point I do not think it necessary to express an opinion, because the appellant may, I think, rely with confidence on the signification of the transfer made on the 4th Nov.

(1) *Ryan vs. Halpin*, 6, L. C. R. 61, and the authorities there collected.

1859, "*à la réquisition des appelants*" as a ratification of the notarial acceptance for her.

This view is justified by the 11th section of the 13 and 14 Vict., Cap. 59, which has already been quoted by the Chief Justice, and is also in accordance with the judgment of this Court, in the case of Ryan and Halpin. (2)

In that case the Court decided that the acceptance of an obligation creating a special hypothec, was not necessary to give validity to such special hypothec, and also (*vide second considérant* of the Judgment of the Court of appeals) "qu'en supposant même que cette acceptation fut nécessaire, l'enregistrement fait de la dite obligation équivalait à cette acceptation."

Now it will hardly be contended that the signification of the transfer under the statutory provision already adverted to, ought not to be as effectual in the way of a ratification of a deed, as the enregistration of such deed.

I therefore think that the transfer in favour of the appellant, ought to have been maintained, and that, in so far as may be necessary to give effect to it, we must reverse the Judgment of the Superior Court.

SIR L. H. LA FONTAINE, Bart., Juge-en-Chef.—Le 28 février, 1859, à Montréal, La Banque d'Ontario obtient un jugement contre Edmund Barnard et Olivier Berthelet, pour la somme de \$3602, avec intérêt sur \$3600, à compter du 11 septembre, 1858, et les dépens taxés à £18.18.9 courant.

Le 2 novembre, 1859, (Hunter, notaire,) acte d'obligation par lequel Barnard reconnaît devoir à la Dame Charlotte Mathilde Perrault, la somme de \$1125, payable à demande, et lui cède et transporte, comme sûreté collatérale, un montant égal dû au dit Barnard par John Platt, sur jugement pour plus forte somme, rendu le 30 juin, 1859,

(2) Ryan vs. Halpin, 6, L. C. R. p. 70, Sir L. H. Lafontaine Bart., C. J., Aylwin, Duval and Caron, Justices.

dans une cause No. 493, de Barnard contre le dit Platt, ce qui a été accepté par le notaire, la dite Dame Perrault n'étant pas présente. On a prétendu que cette acceptation par le notaire était nulle. Je ne le pense pas, et je crois que cette prétention est contraire à la Jurisprudence de nos Cours en pareille matière, du moins en ce qui concerne de simples obligations. Du reste, le dit acte a été dûment signifié par le notaire au dit Platt, le surlendemain de sa passation, c'est-à-dire, le 4 du dit mois de novembre. Le Statut Provincial, 13 et 14^e Vic. ch. 39, sec. 11, dit :
 " Toutes notifications, significations et protestations faites
 " par les notaires à la requisition d'une partie et sans
 " qu'elle ait accompagné les notaires ou le notaire, ni signé
 " l'acte, seront authentiques et feront preuve par elles-
 " mêmes de leur contenu jusqu'à récusation ou désaveu
 " par la personne (ou autres ayant droit) au nom de qui
 " ces significations, notifications et protestations ont été
 " faites." (1)

L'acte de signification du 4 novembre comporte, ce me semble, une ratification par la Dame Perrault, du transport du 2, jusqu'à désaveu de sa part. Or le désaveu est loin d'avoir été fait. La signification lie donc le débiteur délégué, M. Platt, aussi bien qu'il lie la dite Dame et le cédant Barnard, parties au dit acte du 2 novembre. Il y a plus, c'est qu'il y a eu encore ratification de la part de la dite Dame C. M. Perrault, d'abord par son *opposition à la délivrance des deniers*, formulée par elle le 28 mars, 1860, entre les mains du Shérif Boston, dans la dite cause de Barnard contre Platt, et encore plus formellement, si c'est possible, par sa requête en intervention en cette cause. La dite Dame C. M. Perrault serait bien malheureuse si, avec toutes ces ratifications, ses prétentions ne pouvaient pas être maintenues..

Le jugement du 30 juin, 1859, obtenu par Barnard contre Platt, a été dûment enregistré le 6 juillet suivant. Delà

(1) Statuts Ref. du Bas-Canada, ch. 73, sec. 27.

hypothèque légale et générale acquise au dit Barnard sur les immeubles du dit Platt, laquelle hypothèque dûment transmise à la dite Dame C. M. Perrault par l'effet du susdit transport et de sa signification, *pour autant*.

Platt, après la saisie de ses immeubles par le Shérif, a payé entre les mains de ce dernier le montant réclamé par cette saisie, savoir, £414.7.7. Cette somme, le Sherif Boston l'a reçue *en sa qualité de Shérif*, et, comme il le dit lui-même dans sa déclaration sur la saisie-arrêt dont il s'agit, "*in satisfaction of a debt*," c'est-à-dire en paiement de la dette du dit Platt, de laquelle dette la dite Dame C. M. Perrault était alors saisie, pour la plus grande partie. Ce que Platt payait ainsi sous la saisie de ses immeubles, et ce que le Shérif recevait en qualité de Shérif, était donc la créance de la dite Dame C. M. Perrault. Platt payait au nom de la Justice et était à l'avenir libéré; le Shérif recevait ainsi au nom de la Justice, et recevant pour la créancière, Madame C. M. Perrault, dûment saisie du montant du transport, il doit lui payer ce montant.

La saisie-arrêt faite entre ses mains n'a pas été faite en sa qualité de Shérif, mais seulement en son nom individuel. Comme tel, il n'avait rien appartenant à Platt, ni à Barnard. En qualité d'Officier de la Justice, il avait la somme ci-haut mentionnée.

Par son intervention, Madame C. M. Perrault conclut à la nullité, pour autant, de la dite saisie-arrêt, et pour l'excédant de sa réclamation, elle conclut à ce que la dite saisie-arrêt soit déclarée bonne et valable en ce qui peut regarder le dit Barnard. Je ne vois pas d'objection à accorder la première partie de ses conclusions. Quant à la seconde partie, j'y vois une grande objection, c'est que la saisie-arrêt est contestée par le défendeur Barnard, par deux exceptions péremptoires où il raconte toutes ses transactions avec son ancien client, M. Olivier Berthelet, et que cette contestation subsiste encore.

Par la conclusion prise pour elle-même, dans son

intervention, il est évident que Madame Perrault veut procéder ultérieurement sur son opposition à la délivrance des deniers, pour obtenir le paiement de la balance qui lui est due sur le dit acte d'obligation et transport, savoir la somme de \$1050.85, cts. avec intérêt sur icelle à compter du 15 nov., 1859. C'est probablement la manière la plus régulière de procéder.

The Court, &c.—Seeing that it is established that the sum of £361.5.0, currency, and certain interest, mentioned in the declaration of John Boston, one of the tiers-saisis, made in this cause on the 11th day of April, 1860, was received by the said Boston, as sheriff of this district, on the 27th day of March, 1860, under and by virtue of a certain writ *de terris*, issued in the cause No. 493 in the Superior Court for this district, in which Edmund Barnard, esquire, advocate, was plaintiff, and John Platt, esquire, advocate, was defendant.

Seeing that by the deed styled “ obligation, mortgage and transfer,” bearing date the 2d day of November, 1859, executed before Hunter, and his colleague, notaries public, the said Edmund Barnard acknowledged to be indebted to Dame Charlotte Mathilde Perrault, the appellant in this cause, in the sum of \$1125, currency, and, by the said deed, promised to pay the said debt to the said Dame Charlotte Mathilde Perrault, thereof accepting, by the said notaries, on demand, with interest at the rate of six per centum from the date of the said deed.

Seeing also that by the said deed the said Edmund Barnard declared that he thereby assigned, transferred and made over to the said appellant, to the amount of the said debt and interest, the said judgment in his favour against the said John Platt, in the said cause No. 493, in satisfaction whereof the said John Boston so received the said sum of £391.5.0, so mentioned in his said declaration.

Seeing also that by a certain notarial instrument, bearing date the 4th day of November, 1859, a copy whereof is

filed in this cause, the said Hunter, and his colleague; notaries public, declare that, at the request and instance of the said appellant, they repaired to the Montreal House in the city of Montreal, and there being and speaking to the said John Platt, did signify and make known to him the said deed of obligation and transfer hereinbefore mentioned, and did, then and there, in due course of law, serve a copy of the deed of signification.

Seeing that by the 27th section of the chapter 73 of the Con. Stat. of L. C., it is declared that : " Every notification, protest and service thereof, made by any notary at the request of a party who has not accompanied such notary, nor signed the deed, shall be authentic, and be evidence in themselves of their contents until called into question or disavowed by the person in whose name such notification, protest and service have been made, or any other to whom it appertains."

Considering that the said signification of the said deed of obligation and transfer, at the instance of the said appellant, was a valid and sufficient ratification by her of the said acceptance on her behalf of the said deed of obligation and transfer :

Considering, therefore, that under and by virtue of the transfer so ratified as aforesaid, the said judgment, in the said cause, to the extent already mentioned, became legally vested in the said appellant on the said 4th day of November, 1859, and therefore, so became vested in her, long before the attachment of the amount of the said judgment, under and by virtue of the *saisie-arrêt* in this cause issued on the 27th day of March, 1860 :

Considering, therefore, that in the Judgment rendered in this cause, by the Superior Court, in which it is, in effect, declared that the said transfer was not legally accepted by the said appellant, there is error—the Court doth, in consequence, reverse the said Judgment, to wit, the Judgment

rendered by the Superior Court in this cause, on the 26th day of December, 1860, and proceeding to render the Judgment which the said Superior Court ought to have rendered in the premises, doth maintain the intervention filed in this cause by the said appellants, and doth declare that the said Judgment debt, in the said cause, No. 493, to the extent of the said sum of \$1,125, currency, with interest as aforesaid, became, on the said 4th day of November, 1859, legally vested in the said Dame Charlotte Mathilde Perrault, the appellant :

And this Court, doth, in consequence, set aside and annul, to the extent of \$1050 85 cents, with interest from the 15th day of November, 1859, that being the balance now due on the said debt of \$1125 currency, the *saisie-arrest* in this cause issued, and doth, to that extent, and in no greater extent, grant *main-levée* of the said *saisie-arrest* to the said John Boston and John Platt, and this Court, doth also declare that the said sum of £391.5.0, so declared by the said John Boston to be in his hands, and which was so paid to him by the said John Platt, belongs, to the extent of the said sum of \$1050, 85 cents, with interest from the 15th day of November, 1859, to the said Dame Charlotte Mathilde Perrault, the appellant, and it is ordered that the record in this cause be remitted to the Court below, in order that, after the representatives of the said John Boston shall have been made parties in this cause, such further proceedings respecting the payment of the said sum of \$1050 85 cents, and interest as aforesaid, may be had, as to law and justice may appertain.

And this Court, doth condemn the respondent to pay to the appellants, their costs in the Court below, on the contestation by the respondent of the intervention of the said appellant, and also the costs of them the appellants in this cause.

LAFLAMME, R. et G., pour les appellants.

BELLE, pour les intimés

CIRCUIT COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 506. { BRUNELLE..... *Plaintiff.*
 { VS.
 { SAMSON..... *Defendant.*

Held :—1o. That the amount allowed by way of taxation to a garnishee is recoverable by suit at law.

2o. That a garnishee or witness is not entitled to take legal proceedings for the recovery of his taxation without having previously demanded payment.

Jugé :—1o. Que le montant accordé sous forme de taxe à un tiers-saisi peut être recouvré par action.

2o. Qu'un tiers-saisi ou un témoin n'a pas le droit de procéder pour le recouvrement de sa taxe avant d'en avoir préalablement fait la demande.

Judgment rendered the 24th March, 1863.

The plaintiff brought suit against the defendant for the sum of \$2.00, which he claimed as the amount of his taxation as garnishee in the case of Samson vs. Lemieux.

The defendant answered, first, *en droit* : That the plaintiff could not maintain his action because by law he should have taken an execution for the amount of his taxation against the party who summoned him, the said taxation being by law held to be equivalent to a judgment of the Court in his favor ; and because he could not, as he had done in the present action, claim judgment for an amount for which he already had the judgment of the Court ; and secondly, on the merits : That the plaintiff could not succeed or recover the amount of his taxation because he had not appeared on the day on which he had been summoned to appear and answer as garnishee ; and because he had not demanded the amount of his taxation from the defendant, before taking the present proceedings.

DECHÈNE, for the defendant, cited the Con. Stat. L. C. cap. 83, sec. 153, and urged that it should apply to this case, as witnesses and garnishees ought, in this particular, to be looked upon in the same light, and entitled to the same privileges.

That, in any case, the action must be dismissed, as no

demand had been made upon the defendant for the amount of the taxation previous to the institution of the action, and that the action could not be regarded as a demand, because the certificate of taxation was only procured at the *enquête*, and after the completion of the pleadings, and the incurring of all the expenses.

GIBSONE, for plaintiff. Argued that the Con. Stat. L. C. cap. 83, sec. 153, which provided for the recovery of a witness's taxation, had no application to the present case; that as to the plea set up, "that the defendant had never been asked for the amount, and had therefore a right to have the action dismissed," it could not be maintained inasmuch as the action itself was a sufficient demand, and by pleading both *au fonds et en droit* the defendant showed his unwillingness to pay, and was therefore liable for the costs as well as for the principal.

TASCHEREAU, Justice :—The *défense au fonds en droit* must be dismissed, the statute cited not being applicable to this case, I will therefore maintain the action, but costs must be awarded to the defendant as he could have no sufficient knowledge of the plaintiff's taxation until after the certificate of the clerk of the Court was produced. This was only produced at the *enquête*, and, therefore, the costs previous to its production must go against the plaintiff.

Judgment :—Against the defendant for \$2.00, and the costs of the *défense au fonds en droit*. The costs of the action previous to the filing of the certificate of taxation awarded to the defendant against the plaintiff.

CAMPBELL and GIBSONE, for plaintiff.

DECHÈNE, for defendant.

COUR DE CIRCUIT.—QUÉBEC.

Présent :—STUART, Juge.

No. 2914. { JORIN..... Demandeur.
vs.
SYMONS..... Défendeur.

Jugé :—Que dans un affidavit pour saisie-arrêt avant jugement, le déposant doit jurer qu'il est informé d'une manière croyable, à toute raison de croire et croit véritablement en sa conscience, que le défendeur est sur le point de laisser, &c.; et que la formule du statut doit être strictement suivie, sous peine de nullité. (1)

Held :—That in an affidavit for a ~~saisie-arrêt~~ before judgment, the deponent must swear that he is credibly informed, has every reason to believe and doth verily and in his conscience believe, that the defendant is now immediately about to depart, &c.; and that the form of affidavit given in the statute must be strictly followed, *sous peine de nullité*.

Jugement rendu le 25 novembre, 1863.

La question soumise dans la cause s'élevait sur la motion du défendeur pour faire mettre de côté (*quash*) le writ de saisie-arrêt, et toutes les procédures faites en vertu d'icelui. (2)

Le demandeur, après avoir juré que le défendeur lui était endetté etc., alléguait dans son affidavit. "Et le déposant dit qu'il croit que le dit Symmons est sur le point de laisser la Province du Canada, dans l'intention de frauder le déposant, et que sans un bref de saisie-arrêt pour saisir-arrêter les biens, dettes et effets du dit Symmons, et en sa possession, le déposant perdra sa dite créance et souffrira des dommages.

Un bref de saisie-arrêt ayant émané sur cet affidavit, le défendeur fit motion pour le faire mettre de côté : "Parce qu'il n'est aucunement dit ni allégué dans l'affidavit que le déposant était, lors de la confection d'icelui dit affidavit, informé d'une manière croyable, "et avait toute raison de croire, et croyait vraiment

(1) 13 Dec. Bas-Canada, p. 465, Godin vs. McConnell.—Ibid. p. 469, Boudrot vs. Locke, et al.

(2) La même difficulté s'était rencontrée dans six autres causes contre le même défendeur et les jugements dans toutes ces causes furent de même que dans la présente.

“ dans sa conscience, que le dit Symmons était immédiatement sur le point de laisser incontinent le Bas-Canada.

“ Parce qu’il n’est aucunement dit dans le dit affidavit que le dit Symmons fut alors sur le point de recéler, ou recélait ses biens et effets, dans l’intention de frauder le déposant ; et que le déposant ne dit pas non plus qu’il était informé que le dit Symmons était sur le point de recéler, &c.

Bossé, pour le défendeur.—La sect. 57 du Cap. 83 des Stat. Ref. du Bas-Canada, ordonne impérieusement que la forme qui y est indiquée sera suivie, sous peine de nullité, et le seul moyen d’obtenir un bref de saisie-arrêt est de se conformer au statut. D’ailleurs, le statut en disant qu’un bref de saisie-arrêt pourra émaner lorsqu’il apparaîtra au Juge ou Prothonotaire qu’il y a cause probable suivant les exigences de la loi, et en donnant en même temps les raisons mentionnées en la forme de l’affidavit B, indique par là même, quelles étaient les raisons sur lesquelles le Juge ou Prothonotaire devait croire qu’il y avait cause probable etc. Toute variante qui change d’une manière notable le sens de l’affidavit doit donc être fatale.

CARON, pour le demandeur.—Répondit que la forme de l’affidavit n’était d’aucune importance pourvu qu’il fût clairement énoncé dans l’affidavit, et démontré à la satisfaction du Juge ou du Prothonotaire, que le défendeur était endetté envers le demandeur, et qu’étant ainsi endetté il était sur le point, ou de laisser cette Province, ou de recéler ses biens, dettes et effets dans l’intention de frauder ses créanciers, et que sans le bénéfice d’un writ de saisie-arrêt le demandeur perdrait sa dette, etc. Il se fondait sur la section du statut cité par le défendeur, et il ne voyait pas pourquoi cette partie de la loi devait être suivie aussi strictement que le voulait le défendeur.

STUART, Justice.—Upon the present motion to quash the *saisie-arrêt*, there are two principal reasons or grounds which would dispose me to grant it, and to set aside

the writ ; the first is that the deponent does not swear that he is credibly informed of the facts he has sworn to, he simply swears that he believes them ; and the second ground is, that, although the statute requires proof that the defendant is about to leave Lower Canada, it is only alleged in the affidavit that the defendant is about to leave Canada ; on either of these grounds I would be disposed to quash the writ, for in any proceeding so severe upon the defendant as is the *saisie-arrêt* before judgment, the very word and letter of the law ought to be strictly followed out. Upon consultation with Judge Taschereau we are both clearly of opinion that the first ground given above is sufficient to cause the writ to be set aside. To entitle a party to a *saisie-arrêt* before judgment the statute requires proof that the defendant is immediately about to depart from Lower Canada, or to secrete his effects, and this with intent to defraud ; where is the proof in the case before the Court of these necessary facts, the deponent has sworn that he believed so, or thought so, but what reasons had he for forming these opinions, none appear in the affidavit, and he may have thought or believed as he has sworn, without having had any reasons at all.

Jugement ;—La motion est accordée et le bref de *saisie-arrêt* est mis de côté.

CARON, pour le demandeur.

Bossé et Cook, pour le défendeur.

SUPERIOR COURT.—MONTREAL.

Before :—BERTHELOT, Justice.

No. 2603 { BYRNES Plaintiff.
 vs.
 { TRUDEAU *et ux.* Defendants.

A husband and wife, *communs en biens*, undertook by notarial obligation to pay the plaintiff a sum of money acknowledged to have been lent and advanced "to them," without any expression of *solidarité*, and to secure the payment of the debt a mortgage was given upon certain real estate, a *propre* of the wife :

Held :—In an action against husband and wife, that the wife having subsequently obtained a separation of property from her husband, and duly executed the judgment, she had become free from her obligation, and the land discharged from the mortgage, by reason of such judgment, and of the clause of the Registry Ordinance, 4 Vic. cap. 30, sect. 36.

Un mari et une femme, *communs en biens*, entreprirent par obligation notariée de payer au demandeur une somme d'argent reconnue leur avoir été prêtée, il n'était rien dit quant à la *solidarité* entr'eux, et pour assurer la dette une hypothèque fut créée sur certain immeuble, propre de la femme.

Jugé :—Dans une action contre le mari et la femme, que la femme ayant subseqüemment obtenu une séparation de biens d'avec son mari, et dûment exécuté le jugement, elle était libérée de l'obligation, et l'immeuble déchargé de l'hypothèque, et ce en raison de tel jugement, et de la clause de l'ordonnance des enregistrements, 4 Vic., cap. 30, sec. 36.

Judgment rendered the 30th November, 1863.

The action was brought against Trudeau and his wife upon a notarial obligation of 27th September, 1854 ; by this obligation the defendants acknowledged themselves indebted to the plaintiff in the sum of " 1000 livres, ancien " cours de cette province, pour prêt de pareille somme, que " les dits débiteurs connaissant (sic) avoir eu et reçu de la " dite créancière, et dont ils sont contents et satisfaits.—Les " dits débiteurs promettent et s'obligent de bailler et payer " cette dite somme de mille livres, dit cours, à la dite Dame " créancière à son ordre, ou à ses légitimes représentants, " dans un an de cette date, avec intérêt, &c." for securing the payment of this sum they specially mortgaged lands described in the obligation. Conclusions for a condemnation for £53.17.6, with interest, and " that the said lands " be declared under mortgage in favor of plaintiff for payment of said sum and interest, till perfect payment."

The wife pleaded separately to the effect that at the

date of the obligation she was *commune en biens* with her husband ; that on the 20 November, 1862, she obtained a judgment *en séparation de biens*, since duly executed ; that she had renounced to the *communauté*, and could no longer be held responsible, and that she was entitled to ask the nullity of the *hypothèque* claimed, alleging also that the lands hypothecated were her *propres*. The plaintiff answered that the exception was untrue and insufficient in law ; that the debt sued for was contracted, not by the husband alone, but by the wife for herself ; that both consented that the lands described should be mortgaged for securing to the plaintiff full payment ; that nothing pleaded could free the female defendant, or could free the lands from the said mortgage ; and that the judgment of separation was *res inter alios acta* and could not prejudice the rights of the plaintiff.

At *enquête* admissions were made as to the identity of the lands described in the obligation and judgment, and that they belonged to the female defendant previous to her marriage, and also that the judgment of separation was rendered and executed, and that the plaintiff had not filed any opposition upon the proceeds of the movables of the husband, sold under that judgment.

McKAY, for plaintiff, argued, that the case was not one of an obligation, by a wife *séparée*, becoming surety for her husband, but an obligation by a woman *commune en biens*, in common with her husband, as had always been allowed in Lower-Canada ; that the obligation was most favorable for the plaintiff, the husband and wife not obliging themselves *solidairement*, but each for a half ; that had a third person joined as debtor in such obligation, the debt would have been divisible into three parts, and would have been treated as the obligation of the wife for one third, of the husband for a third, and of such third person for the last portion ; (1) that the wife having contracted

(1) *Rennusson, Communauté*, p. 158, No. 26.

as *commune*, became and still was bound as under the old law such a woman was; that though the community between her and her husband was dissolved, the wife could not free herself from the debts at the contracting of which she had herself spoken; (1) that the wife could have sold her *propres*, and she might mortgage them for her own obligation; that in the present case there was *affectation hypothécaire* made for securing the total debt; that a wife though obliging herself personally only for a portion of a debt, could pledge, or affect hypothecarily, à *propre* of hers for the total of it, (2) in the present case the wife had done this, and the hypothec claimed was to be declared *tenant*, as prayed; that there was nothing in the registry law against the plaintiff's pretensions.

BETOURNAY, for defendants, argued, that the wife could not be held liable except as *commune*; that it was admitted that she had renounced the community, and that, in consequence, she was not by the provisions of the 4 Vic. ch. 30, sec. 36, liable; that by that statute a wife could not contract, but as *commune*, nor be held or bound except so long as she continued to be *commune en biens*.

BERTHELOT, Justice, stated the pleadings and held that under the clause in the registry ordinance referred to, the old law had been changed, and that by reason of the separation duly executed, the wife must be relieved from responsibility under the obligation, and the action dismissed, so far as she was concerned.

Jugement.—Considérant que l'obligation du 27 de septembre, 1854, récitée en la déclaration est une dette de la communauté qui a existé entre les défendeurs, au paiement de laquelle la défenderesse ne paraît pas avoir été tenue en son nom seul, et que par la loi du pays la dite défenderesse, Louise Fontaine dite Bienvenue, ne pouvait en ce cas s'obliger que comme commune en biens avec son mari pour

(1) Poth., Comm. No. 573.

(2) 19 Duranton, No. 368.

la dette de ce dernier, ou pour une dette de la communauté, sous peine de nullité de toute telle obligation, ainsi par elle contractée pour ou avec son mari, soit directement ou même comme sa caution ; vu que depuis la passation de la dite obligation la dite Louise Fontaine dite Bienvenue a obtenu sentence de séparation de biens d'avec le dit David Trudeau, son mari, laquelle a été suivie de sa renonciation à la dite communauté, le 22 novembre, 1862, dûment insinuée ; et que finalement par jugement du 31 décembre, 1862, homologatif du rapport du Praticien nommé pour constater ses reprises et droits matrimoniaux, elle a fait reprise comme à elle propres des immeubles qui paraissent avoir été hypothéqués par l'obligation du 27 de septembre, 1854, et désignés comme suit au jugement homologatif du dit rapport, savoir : &c.

Considérant, qu'à raison de tout ce que dessus la dite défenderesse, Louise Fontaine dite Bienvenu, a le droit d'être relevée et déliée de la dite obligation par elle contractée dans et par le dit acte, comme elle l'est par le présent jugement, et que les dits immeubles doivent être déclarés affranchis de l'hypothèque que la demanderesse prétend avoir sur iceux par suite de la dite obligation, déboute la présente action en tant que la défenderesse y est concernée, et ce avec dépens.

MACKAY and AUSTIN, for plaintiff.

CARTIER, POMINVILLE and BETOURNAY, for defendants.

**QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE.**

Before:—Sir L. H. LaFontaine, Bart., Chief-Justice, Duval, Meredith and Mondelet, Justices.

LANIGAN..... *Appellant.*

and

GAREAU..... *Respondent.*

Held, in the Superior Court :—That a location ticket or licence of occupation signed by a local Crown Lands agent, confers no right on the holder of such ticket to maintain the actions referred to in Con. Stat. of Canada, chap. 22, sect. 13, inasmuch as by the said section it is enacted that : " The commissioner of Crown Lands may issue, under his hand and seal "such licences, &c."

In Appeal :—That a judgment rendered in the Superior Court, out of term, will be reversed, if the Court was not adjourned to the day when such judgment was rendered.

Jugé, dans la Cour Supérieure :—Qu'un billet de location ou licence d'occupation, signé par un agent local, ne confère aucun droit sur celui auquel il est accordé pour maintenir les actions auxquelles il est référé dans le Stat. Con. du Canada, chap. 22, sec. 13, en autant que par la dite section il est statué que : " Le commissaire des Terres de la Couronne pourra " émaner, sous son seing et sceau, &c."

En Appel :—Qu'un jugement rendu dans la Cour Supérieure, en vacance, sera infirmé, si la Cour n'était pas ajournée au jour où tel jugement a été rendu.

Judgment rendered the 7th December, 1863.

Duval, Justice.—This case comes up in consequence of an error of the Judge of the Superior Court, sitting at Aylmer. The Court was adjourned to the 1st and 2nd of May, 1862, for rendering judgments; but by some oversight, judgment was rendered, as appears by the record, on the 5th May. It was to have been expected that the attention of the Court below would have been directed to this matter by the Counsel, so as to have had the judgment properly rendered, but instead of this an appeal was taken, and the Court here cannot uphold the judgment, but will grant no costs.

Mondelet, Justice.—Stated that all the members of the Court were agreed on reversing the judgment; for his own part he would have preferred to have treated the judgment as a nullity inasmuch as the Court below had no jurisdiction, and therefore nothing was done legally. If he were

correct in this, then there was no judgment rendered, and the Court here should so declare. If the plaintiff took out execution on a judgment which was a nullity, the defendant might have recovered upon what in England would be termed an action on the case, or proceedings by *requête civile* might be adopted, and the Court might recall or get rid of the judgment.

MARSHALL, Justice.—Held that the party against whom judgment was rendered had an immediate interest in setting it set aside, and to be relieved from any seizure of his property, even if execution did not issue, yet by registration of the judgment a mortgage would be created on the defendant's property which he had an interest to avoid. He was the more disposed to concur in the view of the majority of the court, as to not granting costs, as he thought that the judgment complained of, being utterly null, could have been set aside without an appeal to this Court.

Judgment in the Court below :—Considering that the License of occupation produced by the plaintiff as his exhibit number one, was not issued according to law, and could confer upon the plaintiff no right of property to lot number twenty four, in the sixth range of lots, in the Township of Wakefield, described in the said License of occupation, the Court doth adjudge that the said plaintiff has no right of action against the said defendant, for the reasons mentioned in the plaintiff's declaration."

Judgment in Appeal: Seeing that the judgment complained of was rendered on a day on which the same could not legally be pronounced: (1) The Court doth reverse, set aside and annul the said judgment, to wit: the judgment pronounced on the 5th day of May, 1862, by the Superior Court, sitting at Aylmer, in order that the parties, plaintiff and defendant, in the Superior Court, may take therein such further proceedings on the inscription made of the

(1) Can. Stats. L. C. caps. 78 and 83, secs. 18 and 37.

cause for final hearing on the merits before the said Court, as they may be advised.—Each party to pay his own costs in appeal, costs below to be subject to the judgment.

MONDELET, Justice, dissents, being of opinion that the appeal should be dismissed, purely and simply.

PERKINS and AYLEW, for appellant.

FENWICK, for respondent.

SUPERIOR COURT.—MONTREAL.

Before :—BERTHELOT, Justice.

No. 2476 } BOURASSA..... Plaintiff.
 } *vs.*
 } BROSSAU, et al..... Defendants.

Held.—That an affidavit for capias by one of several legatees setting up a debt due to himself exceeding £10, currency, and also a debt due to each of his co-plaintiffs, likewise exceeding £10, currency, in an action for the whole amount due, will be set aside and the capias quashed *in toto*, the deponent not appearing to act as the agent, or legal attorney of the other legatees, his co-plaintiffs.

Jugé :—Qu'un affidavit pour capias par l'un de plusieurs légataires alléguant une dette à lui due excédant dix livres, courant, et aussi une dette due à chacun de ses co-demandeurs, excédant de même dix livres, courant, dans une action pour tout le montant, sera mis de côté et le capias annulé, *quashed, in toto*, le déposant ne paraissant pas agir comme l'agent, ou le procureur légal des autres légataires, ses co-demandeurs.

Judgment rendered the 30th November, 1863.

An affidavit was made by Alexander Bourassa, setting up an obligation before notaries, of the 5th Feby. 1841, consented to by François Bourassa, in favour of Hubert Bourassa, his father, for £167.2.10. The marriage and death of the said François Bourassa; his will made in favour of his wife as his universal legatee, who thereby became bound for the said debt. That from the marriage of Hubert Bourassa, three children were born, namely, François, Hubert and Pierre. The marriage of Pierre with Louise Brosseau, from which marriage there was issue, Alexan-

dre Bourassa, the plaintiff, and four children, to whom the mother was named tutrix. That under the will of Hubert Bourassa, the elder, referred to by date, Hubert Bourassa, the younger, became his universal legatee for one half, and the children of Pierre Bourassa, for the other half. The transfer by the husband of Philomène Bourassa to Lepailleur, one of the defendants, of £30, due the said Philomène Bourassa, as her part of the said debt. The affidavit then proceeds as follows :

“ Le dit déposant dit de plus, que la dite Louise Brosseau et la dite Scholastique Bédard, sont endettées personnellement envers lui le dit déposant, et envers le dit Hubert Bourassa, son oncle, et envers la dite Louise Brosseau, en sa qualité de tutrice, et envers le dit François Maurice Lepailleur, en une somme d'argent excédant dix livres, argent légal de la Province du Canada, savoir, en une somme de £167.2.10, dit cours, avec intérêt sur cette somme à compter du 5 février, 1841, cette créance étant la même que ci-haut mentionnée, résultant du dit acte d'obligation du 5 février, 1841, laquelle créance est exigible, et est due aux dits créanciers, dans les proportions suivantes ; moitié de cette créance due, au dit Hubert Bourassa, fils, et l'autre moitié à cinq des enfants du dit Pierre Bourassa, et au dit Lepailleur, savoir, au dit Alexandre Bourassa, £13.18.0½, au dit Lepailleur, représentant le dit Laurent Léopold Raymond et son épouse, une égale somme, et à chacun des dits mineurs représentés par leur dite tutrice, une égale somme, le tout portant intérêt du dit jour, 5 février, 1841.”

BERTHELOT, Justice.—A motion had been made to quash the *capias* in this cause, for insufficiency in the affidavit. Several heirs sued for a debt due them and one of them made the affidavit, but did not state that he was the agent or attorney, or that he in any way acted for his coheirs, who were co-plaintiffs in the cause with the deponent. He had not found an analogous case. The case of a copart-

nership was different, one partner might take the affidavit for the firm, but in doing so he was acting for the firm, and in law represented it. He could not say that this was the case in this action. If the plaintiff here swore falsely or without probable cause, the co-plaintiffs would not be bound for the consequences, as a firm would be liable for the affidavit of a member of the firm, in respect of a partnership debt. He had entertained some doubts as to whether the *capias* should be quashed *in toto*, but had come to the conclusion that it must be set aside entirely as not being in conformity with the terms of the statute.

Jugement.—Considérant que le writ de *capias ad respondendum* émané en cette cause à la poursuite de tous les demandeurs, ne l'a été que sur l'affidavit d'un seul d'entr'eux, le dit Alexandre Bourassa, qui ne s'est pas représenté comme le procureur légal des autres demandeurs, et ce, contrairement à la loi, a rejeté et mis de côté le dit writ de *capias*, &c.

LANCOT, for plaintiff.

LEBLANC and CASSIDY, for defendant.

SUPERIOR COURT.—MONTREAL.

Before :—MONK, Justice.

No. 1457 { Moss, et al., Plaintiffs.
 vs.
 { WILSON, Defendant.

The defendant, a merchant resident in U. C., made an assignment of all his property, effects and debts to one of his creditors in trust for the other creditors, and went to the United States, where he resided for some years, and then returned to his previous domicile in Upper Canada, and was afterwards arrested in Montreal. The grounds of fraud alleged in the affidavit were, that the defendant had absconded from the Province and had fraudulently disposed of all his property and effects. The defendant filed a petition contesting the grounds set up in the affidavit, and alleged that the assignment was made according to the law of Upper Canada, and in good faith. The plaintiff answered that at the date of the assignment the defendant was notoriously insolvent, and that by the law of Lower Canada, such an assignment was in fraud of his creditors:

Held :—1o. That the assignment could not, in the case submitted, be held to be in fraud of the creditors, and that the arrest was made on insufficient grounds.

2o. That on the petition of the defendant, the Sheriff will be ordered to return the writ before the return day.

3o. That a consent motion will be granted in chambers, in vacation, naming a commissioner in Upper Canada to take the evidence of witnesses residing there.

4o. That the alimentary allowance referred to in the Con. Stat. L.C., cap. 87, sec. 6, will be divided, and that the plaintiff, in each case, will be ordered to pay a share according to the number of suits pending under which the defendant is detained.

Le défendeur, un marchand résidant dans le H. C., fit transport de toutes ses propriétés, dettes et effets à l'un de ses créanciers pour l'avantage des autres, et se rendit aux Etats Unis, où il résida pendant quelques années, et revint ensuite à son premier domicile dans le H. C., il fut ensuite arrêté à Montréal. La fraude alléguée dans l'affidavit était, que le défendeur avait quitté la Province, et avait disposé de toutes ses propriétés et effets. Le défendeur produisit une requête contestant les allégués contenus dans l'affidavit, et alléguant que la cession avait été faite suivant la loi du Haut-Canada, et de bonne foi. Le demandeur répondit qu'à l'époque de la cession le défendeur était notoirement insolvable, et que par la loi du Bas-Canada, un pareil transport était en fraude de ses créanciers :

Jugé :—1o. Que le transport ne pouvait, dans l'espèce, être considéré comme fait en fraude des créanciers, et que l'arrestation avait été faite sans cause suffisante.

2o. Que sur requête du défendeur, il sera ordonné au Shérif de faire rapport du writ avant le jour du retour.

3o. Qu'une motion de consentement sera accordée en chambre, en vacance, nommant un commissaire dans le Haut Canada pour prendre les témoignages de témoins y résidant.

4o. Que l'allocation alimentaire fixée par le Stat. Con. B. C., cap. 87, sec. 6, sera partagée, et que le demandeur dans chaque cause sera contraint de payer une proportion suivant le nombre d'actions pendantes sur lesquelles le défendeur est détenu.

Judgment rendered the 13th September, 1863.

A writ of *capias* was issued against the defendant, described as formerly of Port Dover, in Upper Canada, now of Montreal. The reasons or grounds of belief given in the affidavit were as follows :

1. Because the defendant, in the fall of 1857, being indebted to plaintiff absconded from Port Dover aforesaid, where he was then trading, leaving heavy liabilities and debts unsatisfied, and that the plaintiff had only been recently informed of his return.

2. Because before absconding he had fraudulently disposed of all his property and stock in trade to the prejudice of the plaintiff, and of his other creditors.

3. Because two credible persons, Wm. Hobbs and Walter McFarlane, had made oath in this city to the foregoing facts, from whose affidavits the deponent had his information to the foregoing effect.

On application of the defendant, the writ of *capias*, returnable the 29th April, 1862, was, by order of a Judge (BERTHELOT) returned on the 17th April.

The defendant then filed a petition denying the allegations of the affidavit, and setting up in detail the particulars of a deed of assignment executed at Port Dover on the 26th August, 1857, to one Henry Howell, of all the defendant's stock in trade, effects and debts for the benefit of the defendant's creditors; that the assignment was made in accordance with the law of Upper Canada, and in good faith; and that at the date of his arrest he was resident at Port Dover, and had no intention to leave Canada.

The plaintiff answered in writing to this petition, that by the Law of Upper Canada, where the debt due to the plaintiff was contracted "such an assignment was, would be, and is made in fraud of the creditors of the said George Wilson, in Lower Canada, as regards debts contracted by him, within Lower Canada, before the date of the said assignment; that the said George Wilson was then notoriously insolvent, and unable to pay his just debts;" that Howell was the defendant's father-in-law, and a mere *prête nom*, and that the assignment was made in bad faith.

By consent of parties a motion was granted in vacation (7th August, 1862), that witnesses residing at Port Dower, be examined by a solicitor, named as commissioner, and the depositions of the witnesses were taken by him without any *Commission Rogatoire* having issued, and without any written interrogatories on either side.

On petition of the defendant an alimentary allowance of 1s. 8d. currency, per week, was ordered to be paid by the plaintiff, the defendant being detained in jail on two other writs of *capias*. (1)

Judgment :—Considering that the petitioner has established the material allegations of his said petition, and the insufficiency of the affidavit under which the said writ of *capias ad respondum* issued, petition granted.

DAY and DAY, for plaintiff.

LEBLANC and CASSIDY, for defendant.

(1) No. 1375, Hobbs vs. Wilson; No. 1382, McFarlane vs. Wilson.—The same judgment was rendered in these cases on the same day.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, MONDELET and CHABOT, Justices.

No. 1030. { **PERSILLIER DIT LACHAPPELLE, et al.. Plaintiffs.**
 vs.
MORETTI, Defendant.

Held.—1o. That where a lease of certain shops and premises contains a condition that the tenant shall not transfer his right in the lease, without the consent in writing of the lessor, a lease of a portion of the premises with a reserve of two rooms by the sublessor, is not a breach of the condition, which can give rise to a rescission of the original lease.

2o. That where such sub-lease was made with the knowledge of the original lessor, who received the rent from the original lessee, without any objection as to the subletting, a sufficient consent to such subletting is to be inferred, and the action in rescission will be dismissed.

Jugé :—1o. Que dans le cas d'un bail de certains magasins et dépendances avec condition que le locataire ne cédera pas son droit au dit bail, sans le consentement par écrit du bailleur, le bail de partie des prémisses avec réserve de deux chambres par le sous bailleur, n'est pas une violation de la condition qui peut donner lieu à la résiliation du bail principal.

2o. Que lorsque le sous bail est à la connaissance du locateur principal, qui a reçu les loyers de son locataire, sans objection au sous bail, le consentement du locateur à tel sous bail sera présumé, et l'action en résiliation sera renvoyée.

Judgment rendered the 20th March, 1857.

The plaintiffs, who were in the rights of Dame Angélique Leduc, brought an action for the rescission of a notarial lease from her to the defendant, dated the 7th February, 1856, of certain buildings in McGill Street, in the City of Montreal; the declaration set forth the conditions of the lease binding on the defendant, one of which was the following:

3. "De ne pouvoir céder son droit au dit bail sans le consentement par écrit de la dite bailleresse," and alleged that the condition had been violated by a lease, made by the defendant, to one Sutherland. The defendant by his plea denied that he had ceded all his rights under the lease, and alleged that by notarial lease of the 29th Feby. 1856, he had sublet to Sutherland a portion of the premises, reserving two rooms which he had always occupied; that the premises were not deteriorated or impaired by the sublease, but were benefited by the large trade carried on in the premises; that the rent had always been punctually paid; and that although the defendant had subleased portions of

the premises, the lessor had never complained, but had tacitly consented thereto, and must have been held to have done so inasmuch as there were three separate and distinct shops, (*loges ou magasins*) and the defendant could not be supposed to have agreed to occupy them all for his own business only; and that, moreover, a portion of the leased premises consisted of a brick building which a previous tenant had erected on the plaintiffs' ground with their consent, which building had been purchased by the defendant, and was to belong to the plaintiffs on certain conditions, and had always been occupied by the other tenants since its erection.

Judgment:—"Considering that the said plaintiffs have failed to prove the material allegations of their said declaration, by reason of which they cannot have or maintain the conclusions thereof; and further considering that the said defendant hath established that he still retained and occupied two rooms in the house and premises so by him acquired by right of lease, under the lease set up in and by his said exceptions, and that the said defendant had a right by law to sublet part of the said premises, and that such subleasing by him was done with the knowledge of the said plaintiffs and their *auteur*; and that by the reception of the rent due by the said defendant, as and for the rent of the said premises, without any objection after the same had been so sublet, the said plaintiffs did assent to the subleasing of the same.—The Court doth maintain the exceptions pleaded by said defendant, and doth dismiss the action of the said plaintiffs, with costs."

CHERRIER, DORION and DORION, for plaintiffs.

LEBLANC and CASSIDY, for defendant.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE.

Before:— Sir L. H. LaFontaine, Bart., Chief-Justice,
 Duval, Meredith, Mondelet and Badgley, Justices.

McDONALD, *et al.*..... *Appellants.*

and

DAVID, *Respondents.*

The respondent employed architects to plan and superintend alterations to certain stores in the City of Montreal; the appellants contracted to do the carpenters' work; the floors sank from one to two inches after the completion of the works, and after the appellants had been paid. By the plans of the architects the joists provided were insufficient to support the floorings:

Held:—That the architects and carpenters were liable, *in solido*, and could be sued in the same action for damages claimed by the respondent, by reason of the sinking of the floors.

L'intimé employa des architectes pour faire un plan de certains changements à des magasins dans la Cité de Montréal et pour en surveiller l'exécution; les appellants entreprirent la menuiserie; les planchers callèrent d'un à deux pouces après les ouvrages complétés, et que les appellants eussent été payés. D'après les plans des architectes les soliveaux étaient insuffisants pour porter les planchers.

Jugé:—Que les architectes et menuisiers étaient responsables, *in solido*, et pouvaient être poursuivis dans une même action pour les dommages réclamés par l'intimé, en raison de l'insuffisance des soliveaux.

Judgment rendered the 12th November, 1863.

In 1856, the respondent resolved to alter some buildings in Great St. James Street, and employed architects to make plans and to superintend the works. The masons, carpenters and other workmen, saw separate specifications and tendered upon them; the carpenters saw only the specifications for the carpenters' work.

On the 15th September, 1856, the McDonalds contracted to do the carpenters' work required, "in strict conformity with the specifications prepared by the architects, and subject to their approval."

The works were done to the satisfaction of the architects and of the respondent, who paid for them.—In February, 1859, a sinking was discovered in the floors; the front wall built by the masons had fallen a little back previously.—In September, 1859, the respondent sued the architects and the carpenters for recovery of £420, setting forth the contract with the architect in the summer of 1856, and their obliga-

tion to furnish and provide all such plans, drawings and specifications, and to superintend the erection and completion of the aforesaid works ; also the contract with the McDonalds, (15th Sept. 1856, Isaacson, N. P.) for the carpenters' and joiners' work. He alleged that in 1859, the floors began to sink from one to two inches " by the " insufficiency of the timber and materials used by the " McDonalds, to support the flooring, and was attributable " to the want of care of the McDonalds, and of the said " architects, in the erection, and completion of the afore- " said works." That he had been obliged to expend and had expended £420, in causing the defective materials to be removed and in causing repairs to be made. Conclusion against defendants, jointly and severally.

The defendants pleaded separately, mis-joinder, or improper cumulation of actions, inasmuch as the liabilities of the defendants were stated as resulting from different contracts, or quasi-contracts, and from no joint wrong or negligence by all the defendants.

This plea of cumulation was rejected. The McDonalds further pleaded that they had been mere jobbers, laboring carpenters, in doing the carpenters' and joiners' works ; that they were bound to follow the directions of Mr. David, and his architects ; that they saw none of the other workmen's specifications ; that they did what they had undertaken to the satisfaction of Mr. David, and his architects, and were paid in full ; that if the plaintiff had any body to blame it was himself or his architects ; and they denied that any damages had been caused by them.

After *enquête* and an expertise, judgment was rendered on the 28th February, 1862, in the Superior Court, Montreal, homologating the report of experts and condemning all the defendants, jointly and severally, for £51.18.½, with interest from the 24th September, 1859, and costs.

The appellants contended that they ought not to have been sued together with the architects, as in this case ;

that all the defendants could not legally be condemned in the same sum of damages, the liability of each set of defendants flowing from different *faits* or contracts, that they had made out their pleas ; and were not liable at all.

MCKAY, for appellants, McDonald *et al.*, argued that the appellants bound themselves to different things, by different contracts. (1) He contended that obligations *in solidum*, were very different from obligations *in solido* ; (2) that in a case like the present the architects and contractors were not to be held *solidairement* liable ; (3) that the decision in Brown and Laurie, might be maintained, as in so doing it was not necessary to hold more than that the builder was liable *in solidum*, no architect having been a party in that cause. That *solidarité* having been pronounced, injustice was done, and that the judgment appealed from was wrong at any rate in so far as it condemned all the defendants, jointly and severally, to costs ; (4) that legal responsibility on architects and *entrepreneurs* is only " *suivant ce qui les concerne respectivement* ; " (5) that the fault here was in the plans, and the carpenters were not to answer for errors of the architects ; that the McDonalds were in the case of jobbers, *ouvriers*, doing work conducted by the master, (6) and were not liable as pretended by the plaintiff.

BETHUNE, for respondent, relied on Brown and Laurie. (7)

MONDELET, Justice, dissenting, stated that in his opinion the exception of cumulation, filed by the defendants, respectively, was well founded and should have been maintained, and thereupon the plaintiff held to make his selection as to the parties against whom he would take farther proceedings in the cause. When the conclusions

(1) Pothier, Obl. Nos. 251, 263.

(2) 11 Duranton, Nos. 183, 189.

(3) Dallos, of 1854, 3rd Partie, p. 9, No. 2.

(4) 11 Duranton, No. 192.

(5) Dallos of 1850, p. 206.

(6) Domat, p. 63, Vol. 1. Edn of 1756.

(7) 1 L. C. Rep., p. 343.

were different, and called for different pleadings or exceptions, and different evidence, as in this case, he held cumulation was well pleaded.

Sir L. H. Lafontaine, Bart., Juge-en-Chief.—Toutes les parties, (demandeur et défendeurs) ont appelé du jugement de première instance. On serait porté à dire que, puisqu'elles en sont toutes mécontentes, c'est que le jugement est bon à première vue. Et je le crois.

Les deux McDonald sont charpentiers entrepreneurs, et comme tels sont associés ; les autres défendeurs, Hopkins, Lawford et Nelson, sont architectes, et aussi associés comme tels.

En 1856, le demandeur avait à faire faire à sa maison, au coin de la grande rue St. Jacques de cette ville, des changements qui nécessitaient des travaux assez considérables.

Il employa à cette fin, comme architectes, les trois derniers défendeurs qui firent les plans et devis requis dans un tel cas. Les deux McDonald entreprirent les ouvrages de charpente et de menuiserie. D'autres entrepreneurs, Payette et Perrault, entreprirent la maçonnerie.

Les premiers plans et devis préparés par les architectes, ne convenaient pas, à ce qu'il paraît, aux goûts économiques du demandeur. Ils eurent à en faire d'autres dont l'exécution devait entraîner une dépense moins considérable. Ces derniers plans, substitués aux premiers, furent donc choisis par le demandeur. Si ses goûts économiques l'ont emporté en cette occasion, et s'il en a souffert par la suite, il a dû le regretter plus tard.

Les ouvrages finis, et certifiés par les architectes, le demandeur paya les différents entrepreneurs et les architectes.

Au commencement de l'année 1859, le demandeur s'aperçut que le second et le troisième planchers avaient baissé de près de deux pouces. Il protesta tous les dé-

seigneurs, le 9 février, par le ministère de son notaire, et les somma de faire ou faire faire de nouveau les travaux qui avaient été mal exécutés.

Prétendant avec raison qu'en pareil cas, l'architecte et l'ouvrier entrepreneur sont responsables des dommages, conjointement et solidairement, il se pourvut en dommages contre tous les défendeurs par une seule et même action. Les architectes et les deux charpentiers ont plaidé séparément ; et les deux parties défenderesses ont présenté, chacune, l'exception de cumulation d'actions, laquelle exception a été déboutée.

Le demandeur, dans sa *déclaration*, allègue la confection des plans et devis faits à sa requisition par les trois architectes, le choix de ces plans et devis, l'entreprise des deux McDonald par acte notarié du 15 septembre, 1856, la surveillance des architectes, avec toutes les clauses ordinaires en pareil cas, stipulée entre lui, le demandeur, et les charpentiers au dit acte du 15 septembre, la confection de tous les ouvrages, les certificats des dits architectes, leur paiement et celui des ouvriers, puis l'affaissement des planchers et les dommages en résultant, attribuant le tout à l'insuffisance des bois et des matériaux employés par les charpentiers, et au manque de soin, d'habileté et d'attention de la part des dits McDonald et des dits Hopkins, Lawford et Nelson, puis le protêt du 9 février, 1859, fait aux défendeurs, la réfection par le demandeur, ou par ses ordres, des ouvrages qu'il avait dénoncés comme étant mal faits et défectueux, le coût que cela avait entraîné, savoir, £420, " which by reason of the said several premises; and by law, the said plaintiff hath a right to recover from the said defendants, jointly and severally," ajoutant " that the said defendants have repeatedly acknowledged their liability aforesaid, but have hitherto wholly neglected and refused to pay the said amount last mentioned...."

Enfin le demandeur prend des conclusions conformes.

En y apportant toute la bonne volonté que les défendeurs,

plaidant comme ils l'ont fait, semblent solliciter, il m'est impossible de voir cumulation d'actions dans une demande qui me paraît être fort simple, et formulée dans une *déclaration* on ne peut plus logique. La doctrine qu'en pareil cas, la responsabilité de l'architecte et de l'ouvrier entrepreneur est solidaire a déjà été consacrée dans la cause de Brown et Laurie, et à moins que les défendeurs actuels, n'approuvant pas la décision, n'aient eu l'espérance qu'aujourd'hui les tribunaux pourraient abandonner une doctrine aussi salubre, il me semble que leur exception de cumulation a été faite en pure perte. .

Au mérite, c'est-à-dire, sur le fond de la demande, c'était une cause à référer à des experts, et le Juge qui a ordonné l'expertise a très bien fait dans l'état de la procédure. Le demandeur, à qui il était permis de nommer un expert, a néanmoins refusé de le faire. Il a fait plus, il s'est abstenu de prendre aucune part aux procédés des experts nommés par la Cour et les autres parties. Si c'est encore dans des vues d'économie, il est certainement le seul à blâmer. Le rapport des experts ne lui accorde que la somme pour laquelle le jugement final a été rendu, savoir : £51.1.8½. Et je suis d'opinion, qu'il n'y a rien à trouver à redire contre ce jugement. Le demandeur ne pouvait s'attendre à obtenir condamnation pour tout ce qu'il demandait. La réfection des travaux a été bien au-delà de ce qui avait fait l'objet de l'acte du 15 septembre, 1856, et on y a employé du bois bien plus coûteux que celui que les défendeurs charpentiers devaient employer aux termes du susdit acte. On a fait des embellissements qui ont pu donner plus de prix à la location des magasins. On paraît avoir fait enfin ce que les premiers plans et devis des défendeurs architectes, plans et devis non acceptés dans le temps par le demandeur, avaient originairement proposé de faire. Mais ce n'est pas une raison de rejeter sur les défendeurs ce surcroît de dépenses, faites uniquement pour le profit du demandeur.

Sur le tout, je suis d'opinion de confirmer purement et

simplement le jugement du tribunal de première instance, et, par conséquent, de renvoyer tous les appels.

DUVAL, Justice.—Held there was no cumulation. The questions of fact were disposed of by the report of the *experts* named under the order of the Court which was an unanimous report. The sum mentioned in the report and judgment, was the sum which would have made the floors secure and prevented the sinking. The plaintiff wished however to make his stores what they would have been, had he accepted the first plans of the architects and not cut them down. He thought that the plaintiff would suffer now from his own fault in restricting the expenditure too much.

MEREDITH, Justice.—I agree with the Chief-Justice, and M. Justice Duval, in the opinion that no sufficient cause has been shown for disturbing the judgment of the Superior Court, in so far as it is based upon the report of the *experts*; that report being in my opinion justified by the evidence. I, however, am of opinion, as we hold the architects and contractors liable for the repairs rendered necessary in consequence of the want of solidity in the work in question, that we ought also to hold them liable for the sum of \$94.5, paid by M. David to M. Hill, in consequence of his removal from the premises whilst the repairs were being made. I think the two claims are to be determined by the same principles; and that, if the plaintiff is entitled to indemnity for the costs of the repairs, he is also entitled to indemnity for the allowance he had to make to his tenants for the interference with their occupation, whilst the repairs were being made. This opinion, however, is not concurred in by any of the other judges; and as I could not expect it to prevail, even if there were a rehearing, I think it right to waive it, in order that there may be a judgment.

There is one other point in the case to which I desire to allude, it is the objection to the joinder of the contractors and architects in the same action, which was much relied

on by the learned counsel for the contractors.* This objection does not seem to me well founded. The contractors and architects, by their negligence, or want of skill, with respect to a work in which they were jointly engaged for the plaintiff, have subjected him to damages ; and as they were jointly concerned in that work, which we by our own judgment condemn, I think it right that they should be called upon jointly to answer it. Had the plaintiff sued them separately, each would have had an opportunity of throwing the blame upon the other, that is upon the party absent ; whereas by means of the suit against them jointly, the matter has been investigated in the presence of all the parties interested.

This view is borne out by the practice which appears to have obtained in France, as well before, as since, the passing of the Code Civil.

, In the well known and important case which is to be found in the 3 Nouveau Denisart, vbo. Bâtiment, p. 312, the architects and builders were sued together.

The same course was followed in a case in which judgment was rendered by the Court of Cassation, on the 20th November, 1817, and which is to be found in the 14th vol. of the *Journal du Palais*, p. 503 ; also in another case decided by the *Cour de Cassation*, on the 12th November, 1846, to be found in the vol. of Dev. and Car. for 1845, part. 1, p. 149 ; and lastly in two cases decided in the *Cour Royale de Paris*, the one on the 17th February, 1853, and reported in the *Journal du Palais*, for 1853, p. 279 ; and the other, as late as the 20th June, 1857, (Vol. 68, *Journal du Palais*, p. 947.)

In each of these cases, as I have already observed, the architect and contractor or builder were sued jointly. In some of the cases the demand of the plaintiff was maintained in whole or in part. In others it was rejected, but it does not, I believe, appear to have been contended, at any stage of the proceedings, by the counsel either for the con-

tractor, or for the architect, or to have been thought by any of the Courts, that there was any irregularity in joining the architects and contractors in one suit.

Believing then,—as I do—that the form of the proceeding adopted by the plaintiff in the Court below, is right in principle, and is justified by practice, I have no hesitation in overruling the objection urged by the contractors and the architects, that they have been, as they say, improperly joined in the same action. At the same time, I do not wish to be understood as holding that an architect in charge is, in all cases, liable for the bad work done by the builders, or that all the contractors engaged about a building are liable for defects resulting from the bad plans of the architect. In the case before us, as I view it, all the defendants are chargeable with negligence, or want of skill, with respect to the work in question ; and, therefore, without going beyond the present case, I hold they were all rightly condemned.

Judgment. Considering that in the judgment appealed from, there is no error ; Appeal dismissed. (1)

McKAY and AUSTIN, for appellant.

BETHUNE, for respondents.

(1) An appeal was also instituted by David, the proprietor, on the ground that he was entitled to larger damages. The architects, defendants in the cause, also instituted an appeal and contended that the declaration was vague and indefinite, and should have been dismissed on an exception *à la forme* filed by them ; also that the exception of cumulation filed should have been maintained ; that the plans were made to suit the views and directions of the proprietor, who from motives of economy, and against the opinion of the architects, insisted upon keeping in part of the old joisting and floors, and had rejected the plans first made by the architects and ordered other and less expensive plans, that the architects were only bound for reasonable professional skill in making the plans ; and were not responsible for, or bound to guarantee that, the stores, which they contended were for light goods or offices, should be suitable for storing the heaviest goods as they now were, at the increased expenditure sought to be recovered by this action : These appeals were also dismissed.

BANC DE LA REINE, } DISTRICT DE MONTRÉAL
 EN APPEL.

Présents :— Sir L. H. LaFontaine, Bart., Juge-en-Chef,
 AYLWIN, DUVAL, MEREDITH et MONDELET, Juges.

NEWCOMB *Appelant.*

et

GRANT, *et al.* *Intimés.*

Jugé, en Cour de première instance :—
 Qu'un bail d'ouvrage ayant été fait par
 un ouvrier entrepreneur, tant en son nom
 qu'au nom d'un autre qui n'a jamais rati-
 fié le bail, et n'y a aucunement participé,
 l'action pour le prix des ouvrages faits
 peut être valablement portée au nom des
 deux personnes désignées en l'acte comme
 entreprenant l'ouvrage.

En Cour d'Appel :—Que, nonobstant
 l'exception plaidée relativement au dé-
 faut de ratification et d'intérêt de celui
 des demandeurs qui n'avait pas accédé
 au bail, la reconnaissance de ce deman-
 deur par le défendeur, résultant des ter-
 mes de son articulation de faits, met l'ex-
 ception au néant.

Held, in the Court below :—That, in the
 case of an undertaking by a contractor
 to do work in his own name, as well as
 in the name of another who never ratified
 the contract, and never participated in
 its execution, an action for the price of
 the work may be brought in the name of
 the two persons named in the deed as
 having undertaken to do the work.

In the Court of Appeals :—That, not-
 withstanding the exception pleaded in
 relation to the want of ratification and
 the absence of interest of the plaintiff
 who had not participated in the contract,
 the recognition of this plaintiff by the
 defendant, by the terms of the articulation
de faits of the defendant, invalidated his
 exception.

Jugement rendu le 9 décembre, 1862.

Il s'agissait d'un jugement de la Cour Supérieure, con-
 damnant l'appelant à payer aux intimés, Grant et Stewart,
 une somme de £321.14.5, au lieu de celle de £433.9.0, ré-
 clamée par l'action.

L'action des demandeurs était fondée sur un contrat no-
 tarié, en date du 5 novembre, 1857, pour la confection de
 quatre milles de chemin de fer, et passé entre " William
 " Newcomb, of the parish of Pointe Claire, of the one part,
 " and Duncan Grant, of Montreal, contractor, of the other
 " part, the said Duncan Grant acting as well in his own
 " name, as in the name of William Stewart, of the city of
 " Montreal, by whom he obliges himself to have these pre-
 " sents ratified and subscribed to."

Le défendeur plaida que Stewart n'était pas partie au
 contrat, qu'il ne l'avait jamais ratifié, que tous les ouvrages

avaient été faits par Grant seul, et les reçus donnés en son propre nom, ce qui fut prouvé ; que Stewart avait reconnu lui-même qu'il n'avait rien à faire avec l'entreprise ; qu'en conséquence l'action était mal portée au nom de Grant et de Stewart conjointement.

Le défendeur plaidait de plus que tout l'ouvrage livré s'élevait à une somme de	£3462. 8.3
Sur laquelle il avait été payé celle de	3352.19.6

Laisant une balance de	£109. 8.9
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mais que cette balance était plus que compensée à raison des dommages résultant de la mauvaise qualité de l'ouvrage, et du retard dans sa confection et livraison causés par la négligence des demandeurs.

Les demandeurs produisirent à l'enquête sous la cote G, une note de la main même du défendeur, écrite en présence du nommé David Kyle, et remise par le défendeur au demandeur Stewart.

Cette note est comme suit :

D. Grant's claim	£3674.13.11	
• Cash received	3352.19. 6	
	<hr/> £321.14. 5	
Claim or balance,	£493. 9.1	
	321.14.5	
	<hr/>	
Difference,	£111.14.8	

Kyle déclare que le défendeur admit en cette circonstance qu'il devait £321.14.5. Il fit le même aveu au témoin Scott.

Le défendeur produisit des articulations de faits dont la 2^e et la 4^e sont ainsi conçus : " 2. That the said plaintiffs did not do any other or more work than is set forth in the exhibits of the defendant in this cause filed, to wit : defendant's exhibit No. 1."

" 4. That the said defendant was put to great expense

and loss in finishing and completing the works undertaken under the contract set up in plaintiffs' declaration, and in remedying the defects in said works, caused by the negligence of the plaintiffs.

Il n'y eut pas de preuve de dommages.

La Cour Supérieure considérant l'admission de Newcomb quant au montant dû, comme décisive, rendit le jugement suivant :

" And considering that the said plaintiffs have established, by sufficient evidence, that the said defendant is indebted to them in the sum of £321.14.5, current money of the province of Canada, as and for the just and true balance remaining due and unpaid to them, the said plaintiffs, for all work done and executed by the said plaintiffs for the said defendant, under the contract set forth in the declaration of the said plaintiffs, and which balance so due and owing was by the said defendant *acknowledged to be due as aforesaid and unpaid* ; and further considering that the said defendant hath failed to establish any thing in law or in fact, by reason of which the conclusions of the said declaration should not or ought not to be granted, the Court doth condemn the said defendant to pay to the said plaintiffs the said sum of £321.14.5, said current money of the province of Canada, with interest thereon, &c.

MONDELET, Justice, *dissentiente*.—I have gone through this case, with care, and have come to the following conclusion : 1o. I do not coincide in opinion with the Court that Stewart having joined in the action, is a sufficient ratification of the contract. The defendant had an interest in pretending that the action is badly brought. 2o. But as to the merits of this case, which are viewed by both plaintiffs and defendant in a different light, I hold that we have no right to set aside or disregard the solemn, clear and precise evidence of Scott and Kyle, touching the acknowledgment made by Newcomb of his indebtedness to the plaintiffs in

the amount of £321. We have no right to substitute our own suppositions and gratuitous assumptions as to the state of the case, in lieu of positive evidence of an acknowledgment by the defendant. There can be no certainty if the evidence is thus to go for nothing, why? Because, to the judge, the merits of the case may appear different from what they appear to the most interested party, the debtor. I never can admit such a doctrine which seems to me, not only subversive of all principle, but unsafe and more than dangerous.

Wherefore, I am of opinion that the judgment of the Court below would be correct, if the action were correctly brought, and that the Judge who gave that judgment, acted a wise part in not abstaining from abiding by the evidence of Scott and Kyle, on the mere ground that it is not to be presumed, though it is clearly proved, that the defendant, who was the creditor, acknowledged himself to be the debtor.

I would, consequently, clearly and firmly opine for the confirmation of the judgment of the Court below. But being of opinion that the two could not join, because there was no contract with both, I am, of course, of opinion that the judgment should be reversed.

The Court, &c.—Seeing that the contract executed before LeTellier, and his colleague, public notaries, bearing date the fifth day of November, one thousand eight hundred and fifty seven, under which the work in question in this cause was done, was entered into by Duncan Grant, one of the respondents, as well in the name of William Stewart, the other respondent, as in his own name; Seeing also that the said work, mentioned in the pleadings in this cause filed, in so far as it was done, was so done in pursuance of the said contract, and that the said plaintiffs allege that the whole of the said work was done by the said Duncan Grant and William Stewart, and not by the said Duncan Grant alone, and that the said defendant, by his articula-

tion of facts in this cause filed, and more particularly by the heads, numbers two and four of the said articulation of facts, in effect admits that the said work, in so far as it was done, was so done, "by the plaintiffs" to wit, by the said Duncan Grant and William Stewart, and not by Duncan Grant alone: Considering, therefore, that the present action was rightly brought in the names of the said Duncan Grant and William Stewart, and that, in the Court below, in so far as it maintains the right of the said Duncan Grant and William Stewart, to bring the present action in their joint names, there is no error; doth confirm the judgment of the Court below, to wit: the judgment of the Superior Court rendered in this cause, at Montreal, on the thirtieth day of March, one thousand eight hundred and sixty one, in so far as it maintains the right of the said Duncan Grant and William Stewart, to bring the present action in their joint names &c.

ROBERTSON, A. and W. for appellant.

CROSS and BANCROFT, for respondents.

CIRCUIT COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 100. { LAMPSON,.....*Plaintiff.*
 vs.
 { McCONNELL,.....*Defendant.*

Held :—That a document *sous seing privé*, containing the stipulations of a *contrat synallagmatique* is valid, and that its production, to prove the reciprocal engagements of the parties thereto, is sufficient, although it be neither executed *en double*, or declared to have been so executed.

Jugé :—Qu'un document *sous seing privé*, contenant les stipulations d'un *contrat synallagmatique* est valide, et que sa production, pour constater les engagements réciproques des parties, est suffisante, quoiqu'il ne soit pas exécuté *en double*, ni allégué avoir été ainsi exécuté.

Judgment rendered the 8th day of January, 1864.

• The plaintiff brought suit for £7.10, and to eject the defendant from certain premises which he occupied under a lease *sous seing privé*. The plaintiff produced the lease

which, with a few alterations, was similar to the ordinary notarial deed and was signed by the plaintiff and defendant. The plaintiff's action set forth the lease, the default of the defendant to garnish the premises, and that the defendant was indebted to him in the sum of £7.10, alleged to be due as a balance of rent under the lease.

To this action the defendant pleaded generally by defense *au fonds en fait*, and, specially, that the lease declared upon was not valid nor binding upon the parties, inasmuch as it had not been executed in duplicate, nor was it stated to have been so executed, either in the plaintiff's declaration or on the face of the instrument itself.

The defendant was examined as a witness and proved the signature of the parties, and that he had occupied the premises in question, but that the instrument had not been made in duplicate, nor had he ever had even a copy of it.

LAMPSON F., for plaintiff. The question now brought before the Court although in itself involving no large amount, is nevertheless one of the greatest importance on account of the effect it will produce as a precedent, for if it be held that in a *contrat synallagmatique sous seing privé*, a writing to be binding must be made in duplicate, a great number of such contracts in Lower Canada will be nullified, for if the *double écrit* be held to be necessary in a lease, it is equally so in a sale, or any other *contrat synallagmatique*.

The question is one which has never come up for decision by our tribunals. The old French authors abound in dissertations on this subject, and are greatly divided on this point. I shall cite two which I think most strongly commend themselves to the consideration of the Court, both from the weight attached to the authors, and for the clearness and soundness of the reasons which they give. The first of these is Guyot who lays down in his *Répertoire vbo. Double Ecrit*, the incontrovertible maxim that the writing is not the bargain, but merely the evidence of it; how

then could the *double écrit* be held to be necessary if all the stipulations and conditions contained in it, can be proved in another way. In the present case the conditions and stipulations of the lease have been proved by the defendant himself in his evidence. The other authority to which I have alluded is a work entitled *Instructions faciles sur les Conventions*, in which the author, after giving the different reasons both for and against the necessity of the *double écrit*, concludes by saying that all depends upon the presumption of good or bad faith in the parties. This seems to me to comprise the whole matter. The only reason for requiring the *double écrit* would be to prevent one of the parties who has the writing in his possession from making alterations and erasures in it, thereby causing the other party signing to appear to have entered into an agreement which in reality he had never contemplated doing. A person who finds that a writing which he has signed has been falsified or altered in any way, ought to be allowed to attack such a writing; it therefore seems necessary that a party taking exception to any written agreement *sous seing privé*, on the ground that it was not made in duplicate, should allege that the writing has been tampered with or falsified in some way. Nothing of the sort has been attempted in this case, the defendant merely contents himself by saying that the lease is null on account of its not having been made *en double*. I would say in conclusion that the defendant was equally bound with the plaintiff to see that the deed was executed in duplicate; and to come forward now and request that a deed be declared null on account of an error to which he himself was a party, is manifestly an act of bad faith on the part of the defendant.

GIBSONE, for the defendant. The question which arises for the decision of the Court, is whether, in cases which must be decided according to the French rules of evidence, the production of an instrument *sous seing privé*, containing

the stipulations of a *contrat synallagmatique*, is sufficient to prove the reciprocal engagements of the parties, if it be proved that the instrument was not executed in duplicate. It is the pretension of the defendant that the law which governs the evidence in this case requires the *double écrit*, as in all other reciprocal contracts. The necessity of the *double écrit* not only guards against all frauds and the loss or wilful destruction of the document and the crime of forgery, but in cases where there is a number of contracting parties it is found necessary in order to avoid errors which would otherwise be almost certain to arise.

TASCHEREAU, Justice.—The question raised in this cause is one which is often met with in the different authors who treat upon the old French law. "Is it necessary, for the validity of a *contrat synallagmatique sous seing privé*, that it should be executed in duplicate." Authorities are to be found both in favor of and against this proposition. I am of opinion that in some cases the *double écrit* would be necessary for the validity of the Instrument, as in a case where fraud might be presumed, but not so in all cases, and more especially will it not be required, or be held to be necessary, in a case like the present where the defendant has admitted the material allegations of the agreement.

The authorities for (1) and against (2) this question are numerous, and the one derived from *Instructions faciles sur les Conventions*, page 178, shows clearly the manner in which this case ought to be decided. "Le Bail doit être fait double, faute de ce, on pourrait n'y avoir aucun égard ; chacune des parties étant obligée, doit avoir un titre contre l'autre. On a souvent déclaré nuls des baux

(1) 1 Pigeau, 10, note a :—6 Rep. de Guyot, vbo. Double Ecrit :—Anc. Denisart, vbo. Ecrit Double, 228 :—7 Nouv. Denisart, 404 :—3 Nouv. Denisart, 772 :—6 Rep. de Guyot, Double Ecrit, 359, 360, note :—8 Toullier Nos. 313, 322.

(2) 8 Toullier Nos. 309 et suivants :—6 Rep. de Guyot, vbo. Double Ecrit, p. 362.—15 Rep. de Merlin, vbo. Double Ecrit, No. 8.—6 Merlin, Quest. de Droit, partie 1ère, p. 158. Art.—1325 du Code, Introd. Droit nouveau :—Arret 3 Sept. 1680 :—Brillon Bail. No. 16 :—8 Toullier Nos. 316 et suivants :—Arrets Parlementaires de Paris, Lacombe p. 378.—4 Jurisp. du Code Civil, p. 460, et suivants :—Lacombe, Arrets, p. 378.—Instructions faciles sur les Conventions, page 178.

“ pour cette raison. M. Bourjon, Titre des Loyers, Chap. 2.
 “ cite un arrêt contraire, tout dépend des circonstances et
 “ des présomptions de mauvaise foi.”

LAMPSON, for plaintiff.

CAMPBELL and GIBSON, for defendant.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 2329. { CLARK,..... *Plain'iff.*
 vs.
 { RITCHIE, *Defendant.*

Held :—In an action for goods sold and delivered by a merchant, residing in Montreal, against a defendant, resident in Upper Canada ; that the whole cause of action arose in Montreal, although part of the goods were ordered by the defendant by letter dated in Upper Canada, and sent to the plaintiff in Montreal, and part were verbally ordered in Upper Canada from the plaintiff's traveller, who took down the order in writing, and brought or forwarded it to the plaintiff, he having the option of filling it or not ; and the goods being held as delivered to the defendant, and at his risk, on delivery to the carrier at Montreal.

Jugé :—Dans une action pour marchandises vendues et livrées par un marchand résidant à Montréal, contre un marchand résidant dans le Haut-Canada ; que toute la cause d'action avait origi- née à Montréal, quoique partie des effets eut été commandée par le défendeur par lettre datée dans le Haut-Canada, envoyée à Montréal, et partie par ordre verbal du défendeur donné dans le Haut-Canada à un agent du demandeur, qui avait pris la commande en écrit, et l'avait apportée ou transmise au demandeur, qui avait le choix de la remplir ou non ; les effets devant être considérés comme livrés au défendeur, et à ses risques, sur remise au commission- naire à Montréal.

Judgment rendered the 31st. December, 1863.

The action was brought against the defendant, described as of the city of Toronto, partly on promissory notes pur- porting to be dated at Montreal, and made by the defen- dant in favour of the plaintiff, and partly for goods al- leged to have been sold and delivered at Montreal. The defendant pleaded an *exception déclinatoire*, upon the ground that he had no domicile, or place of business, within the jurisdiction of the Court, and that he had no property or effects in Lower Canada ; and because the notes re- ferred to were made and signed in Upper Canada, and that the causes of action set up in the various counts of the declaration had originated in Upper Canada.

The plaintiff's answer was general. Before hearing on the exception the plaintiff discontinued his action in so far as the notes were concerned.

SMITH, Justice, stated the pleadings, and said : The only evidence in support of the exception is drawn from the examination of the plaintiff as a witness. It appears from his deposition that part of the goods "were ordered by "letter written by the defendant at Toronto, aforesaid, and "received by plaintiff at Montreal ;" and that another portion "were sold and delivered to the defendant on the "order of the defendant delivered to my travelling agent, "at Toronto, and by said travelling agent transmitted to "me at Montreal." These orders are stated to have been verbal orders written down by the travelling agent, on certain printed forms, and then transmitted to the plaintiff. The plaintiff explains further that the goods when shipped, at Montreal, were at the defendant's risk, and that it was at the plaintiff's option whether or not the orders were filled. Under these circumstances can the action be brought as if the cause of action arose in Montreal.

The cases cited by the defendant all rest on the case of *Borthwick, et al, vs. Walton, et al*, 29 Law and Equity Rep., p. 269, and the same case reported in 15 Common Bench Reports, p. 50.

This case establishes that the whole cause of action must arise within the jurisdiction of the Court. I admit the principle laid down by this decision, but do not consider that it applies to the facts in this case. I hold that the cause of action did not arise in Toronto, nor any part of it. The orders were written there at a certain date, but no part of the contract arose there. Suppose an action of damages brought against the plaintiff for not fulfilling the order. It could not lie, because the order bound the plaintiff to nothing. It had no effect until the plaintiff received it, and accepted, or acted on it. Whether the de-

defendant after writing the order at Toronto sent his own clerk with it to the plaintiff's place of business at Montreal, or sent it by post, or by telegraph, does not seem to me to alter the case. The goods were ordered, and were delivered, at Montreal; the contract was made there; and was fully completed by the delivery to the carrier. The exception therefore can not be maintained. (1)

Exception dismissed.

ROBERTSON, A. and W. for plaintiff.

TORRANCE and MORRIS, for defendant.

CIRCUIT COURT.—MONTREAL.

Before :—LORANGER, Justice.

No. 362 { FERON..... Plaintiff.
vs.
DONELLY..... Defendant.

Held.—10. That no action can be maintained against a woman who is a minor, and not a *marchande publique*.

20. That the production of a certificate of baptism of a party to the suit, purporting to be signed by a parish priest in Ireland, will be taken as sufficient evidence of the baptism; and that the insertion of the "quality, occupation and place of abode of the father" required by the Cons. Stat. of L. C. chap. 20, sect 5, is not requisite in such certificate.

Jugé :—10. Qu'aucune action ne peut être portée contre une fille mineure, si elle n'est *marchande publique*.

20. Que la production d'un extrait baptismaire de l'une des parties à un procès, dit avoir été signé par un curé en Irlande, sera considéré comme preuve suffisante du baptême; et que la mention "de la qualité ou occupation du père et lieu de sa demeure," voulue par le Stat. Ref. du B. C. cap. 20, sec. 5, n'est pas requise en pareil cas.

Judgment rendered the 30th December, 1863.

LORANGER, Justice.—The action was brought against Catherine Donelly, the maker, and one Hayes, the indorser, of a promissory note bearing date the 7th. December, 1860. The maker of the note is described in the declaration as "*filie majeure usant de ses droits*," spinster,

(1) Authorities cited by defendant's counsel :
Cons. Stat. of L. C. pp. 701, 723 :—12 L. C. Rep. p. 145, Senechal and Chenevert :—
3 L. C. Rep., p. 492, Warren vs. Kay :—3 L. C. Rep., p. 187, Rousseau vs. Hughes :—
Frothingham vs. B. and O. Railroad, 3 L. C. Jurist. p. 252 :—2 Bonjean, Actions, pp. 300, 436 :—Borrier, p. 36, art. 3, ord. 1667.

and she pleads that she was and is a minor, and not a *marchande publique*, nor had she any quality which would justify a suit being brought against her. If the plea is made out in evidence, the action must be dismissed.

The proof as to her age consists of a certificate, produced in the case, of a priest in Ireland that : " Catherine Donelly, daughter of Michael Donelly, and Rose Kane, " was validly baptized by me on the 13th. January, 1842, " according to the rites of the Holy Roman Catholic Church." The certificate does not state the date of her birth, and it was argued that she might have been born years before her baptism ; and next that the quality, occupation and residence of the father were not mentioned in the certificate, as required by the provincial statute. The certificate of marriage of the father and mother, certified by the same priest, also produced in the cause, shews they were married on the 7th. February, 1841, and as the action was commenced in April, 1861, Catherine Donelly was evidently a minor, not only when the note was signed, but when the action was instituted. The formality of the provincial statute as to mentioning the quality and residence of the parents is in force in L. C., but the form of certificate required here cannot regulate the form in Ireland, and if it is valid as to form there, it must be held to be valid here.

" Judgment : Considering that the defendant hath established by sufficient evidence the allegation set forth in her said *exception peremptoire*, namely : that at the time of the institution of this action and the service made upon her of the process *ad respondendum* and declaration thereto annexed, the said defendant was still a minor, not having attained her age of majority, and consequently that the present action will not lie against her, doth maintain the said exception, and dismiss the plaintiff's said action, with costs."

ABBOTT and DORMAN, for plaintiff.

DOUTRE, for defendant.

QUEEN'S BENCH,
APPEAL SIDE.
Sitting as a Court of error.

DISTRICT OF QUEBEC.

Before:—SIR L. H. LaFontaine, BART. Chief-Justice,
L'UVAL, MEREDITH, MONDELET, and BADGLEY, Justices.

DUVAL DIT BARBINAS..... *Plaintiff in error.*

vs.

THE QUEEN..... *Defendant in error.*

In this case it was alleged that, in the course of the trial, a medical witness was ordered to make an analysis for the information of the jury, that he had done so, and made a report; but that the report so made, was not placed before the Jury, as it ought to have been, and that, thereby, the prisoner was deprived of the advantage of important evidence in his favour.

Held:—10. That, as the report could not have been submitted to the jury, except as part of the evidence, and, as neither the evidence, nor the rulings of the Judge in relation to it, can be brought under the consideration of this Court by a writ of error, that the plaintiff in error had not a right to have the record amended, so as to place before this Court the said report, and the entries in the Register of the Court below respecting it.

20. That the plaintiff in error could not cause the record to be amended, so as to show whether the Judge who presided at the trial wrote the notes of the evidence himself, or caused them to be written by another person; nor so as to show what precautions were taken for the safe keeping of the jury, whilst deliberating upon their verdict out of Court.

Dans cette cause il était allégué que, dans le cours du procès, il avait été enjoint à un témoin, médecin, de faire une analyse pour l'information du jury, qu'il s'était conformé à cet ordre, et avait fait son rapport; mais que le rapport ainsi fait, n'avait pas été soumis au jury, ce qui eut dû être fait, et que par ce, le prisonnier avait été privé de l'avantage d'une preuve importante en sa faveur.

Jugé:—10. Qu'en autant que le rapport n'eut pu être soumis au jury, excepté comme partie du témoignage, et, en autant que ni les témoignages, ni les décisions du Juge qui y avaient rapport ne pouvaient être soumis à la considération de la Cour par un writ d'erreur, le demandeur en erreur n'avait pas le droit de faire amender le record, de manière à placer soit le dit rapport ou les entrées au registre de la Cour inférieure qui y avaient rapport, devant cette Cour.

20. Que le demandeur en erreur ne pouvait faire amender le record de manière à constater si le Juge qui présidait au procès avait pris notes des témoignages lui-même, ou les avaient fait écrire par une autre personne; ni de manière à constater quelles précautions avaient été prises pour la garde du jury, pendant qu'ils délibéraient sur leur verdict hors de Cour.

Jugement rendu le 19 décembre, 1863.

Cette cause, portée devant la Cour d'erreur (Cour d'Appel) à Québec, aux fins de faire infirmer la sentence de mort prononcée contre Pierre Duval dit Barbinas à Arthabaska, en mars dernier, a été commencée ici, le 30 avril. TALBOT, conseil du demandeur en erreur, fit, en vertu d'un permis (*fiat*) obtenu du procureur-général Sicotte, émaner un bref d'erreur (*writ of error*) de la Cour d'Appel, rapportable le douze juin, or-

donnant à la Cour de première instance, qu'en autant que dans les *record* et les *procédés*, ainsi que dans le jugement, il y avait eu erreur manifeste, au grand détriment du prisonnier Barbinas, elle voulait (la Cour d'Appel) que les dites erreurs, s'il s'en trouvait, fussent rectifiées et amendées, et qu'il fût fait une prompte et entière justice au dit Barbinas. En conséquence, elle commandait au tribunal inférieur de lui transmettre distinctement et entièrement, sous son sceau, le *record* et les *procédés* en la cause, avec tout ce qui avait rapport à iceux ; c'est-à-dire, tout ce qui se rattachait au procès, (*with all things touching the same*, telle est l'expression du bref d'erreur,) afin qu'elle pût, en examinant tels *record* et *procédés*, amender toutes erreurs, au désir de la loi.

Voici le texte même du *writ of error* :—

“ For as much as in the *record* and *process*, as also in the *judgment*, in a certain indictment against Pierre Duval dit Barbinas, heretofore of the parish of St. Germain de Grantham, in the district of Arthabaska, farmer, and now detained in the gaol of the district of Arthabaska, of a certain felony, to wit : murder ; whereof the said Pierre Duval dit Barbinas, by a certain jury of the country, taken thereupon, between us and the said Pierre Duval dit Barbinas, was, thereupon, before you, convicted at a term of our Court of Queen's Bench holden in the district of Arthabaska in the month of March last, as it is said, *manifest error hath intervened* to the great damage of the said Pierre Duval dit Barbinas, as, by *his complaint*, we are informed ; we, willing *that the said error, if any, be duly amended, and full and speedy justice done* to the said Pierre Duval dit Barbinas, in this behalf, *do command you that, if judgment be given thereupon, then you send to Us, in Our Court of Queen's Bench for Lower Canada, aforesaid, sitting at the city of Quebec, distinctly and plainly, under your seal, the RECORD and PROCESS aforesaid, WITH ALL THINGS TOUCHING THE SAME, and this writ, so that we*

MAY HAVE THEM, on Friday, the twelfth day of June next ; that, in INSPECTING THE RECORD AND PROCESS AFORESAID, we may cause further to be done thereupon, FOR AMENDING the said error, as of right and according to the laws and customs of that part of Our said province of Canada, called Lower Canada, shall be meet to be done.

Tel fut l'ordre de la Cour d'Appel. A cela, le tribunal inférieur fit une réponse, où il est dit : Que le 13 mars dernier, il avait été ouvert à Arthabaska-Ville, une Cour criminelle, ayant juridiction dans toutes offenses criminelles, que l'honorable Juge A. STUART, présidait la Cour ; on y dit aussi les noms de dix-huit grands jurés, et l'accusation contre Barbinas d'avoir tué malicieusement Julie Désilie, sa femme, au moyen de poison ; que le dit Barbinas avait comparu le treize mars, en la dite Cour ; et qu'étant là, sous la garde du Shérif, on lui demanda s'il était coupable de ce dont on l'accusait ; qu'il répondit qu'il n'était *pas coupable*, et fit appel à son pays. Suivent les noms du procureur-général et de son substitut, et qu'enfin sur le tout, le procureur-général et le prisonnier, s'en rapportaient à des jurés ayant la qualification requise pour décider si le prisonnier était coupable ou non de l'accusation portée contre lui.

Viennent ensuite les noms de 12 jurés qui déclarent que le prisonnier est coupable ; et que le 21 mars, la Cour, avant de prononcer la sentence, demanda au prisonnier s'il avait quelque chose à dire contre la sentence ; qu'à cela, il demanda la vie ; qu'enfin la sentence fut prononcée et l'exécution fixée au 15 mai, 1863.

Le 15 septembre, 1863, Talbot, fit motion pour un bref de *Habeas Corpus*, qui fut accordée, en conséquence le demandeur fut amené devant la Cour.

Le 18 septembre, 1863, le Conseil du prisonnier fit motion qu'il fut fait un nouveau *retour* au bref d'erreur, au moyen duquel il serait fait, devant la Cour d'Appel,

rapport de tous et tels documents, procédures et entrées sur les registres de la dite Cour de première instance ; ou qu'il fut amendé, attendu que le *record* de conviction était vague, illégal et irrégulier, et ne correspondait pas au désir du bref d'erreur, non plus qu'à la loi, et ne démontrait en aucune façon aucun des griefs d'erreur dont se plaignait le prisonnier, et sur lesquels le *fiat* de la Couronne accordant le bref d'erreur était fondé. Et à l'appui de sa motion, il alléguait les raisons suivantes :

Que dans le rapport ou la réponse fait au bref d'erreur, par la Cour de première instance, on ne mentionnait aucun des faits ou griefs d'erreur dont se plaignait le prisonnier, savoir :

10. Que les dépositions des témoins n'avaient pas été prises par le juge présidant la dite Cour, mais bien par un étranger à la dite Cour, non assermenté, et n'ayant aucune qualité ni pouvoir de le faire. (1)

20. Qu'à la séance du 19 mars dernier, de la dite Cour, les jurés s'étaient retirés de la Cour, sans qu'il fut constaté qu'ils eussent été gardés dans une chambre sous clef, et sans être sous la garde d'huissiers assermentés, tel que l'exige la loi. (2)

30. Qu'un nommé Moïse Forest, un des témoins de la défense, ayant produit deux bardeaux et une gazette sur lesquels il était dit qu'il y avait de l'arsenic, la Cour ordonna au docteur Larue d'en faire l'analyse chimique, et suspendit à cet effet sa séance pendant trois heures ; que

(1) 1 Chitty, Crim. Law, p. 632, "When the evidence and the speeches on both sides are thus concluded, it becomes the duty of the judge to sum up the evidence to the jury. In order to enable him to do this with accuracy, he ought to take notes of the proofs adduced in every part of the proceedings. And this is the more necessary, as these minutes frequently become important documents in a remoter stage of the prosecution : Where the evidence affects several defendants differently, the judge will, as we have seen, select the evidence applicable to each....."

(2) 1 Chitty, Crim. Law p. 628, bailiffs sworn to keep the jury together, if they separate verdict is bad, p. 628, *verso*.....the entry of the adjournment must also appear upon the record, for otherwise the adjournment cannot afterwards be intended..... pp. 632, 633..... the jury retire..... and the bailiff is sworn to keep them.

Toutes ces formalités doivent apparaître au registre, 2 Gabbett on Crim. Law, p. 524.

le docteur Larue fit, de fait, l'analyse chimique des matières contenues sur les dits bardeaux et gazette, et en dressa un rapport, mais que ce rapport n'a été ni ouvert ni publié en Cour, et que le résultat en est demeuré inconnu aux jurés, par la raison que le procureur de la couronne déclara qu'il n'entendait pas examiner le Dr. Larue, qui avait alors son rapport de l'analyse chimique.

Que l'accusé avait droit d'exiger l'ouverture du dit rapport pour en faire connaître le résultat aux jurés ; que ce droit fut refusé par la Cour en disant qu'elle n'avait pas droit d'intervenir, malgré la demande réitérée des procureurs de la défense.

Que les procureurs de la défense firent application à la Cour, le 21 mars dernier, pour l'arrêt du jugement ou sentence de mort contre le prisonnier, et ce pour les griefs susdits, ce qui fut encore refusé par la dite Cour.

Enfin, la dernière raison à l'appui de la motion, était que les erreurs susdites étaient fondées en loi, et que toutes et chacune existaient dans la dite cause ; que néanmoins aucune n'était consignée dans le *record de conviction*, produit en réponse au bref d'erreur ; que le prisonnier ne pouvait obtenir justice de la Cour d'erreur, s'il n'était pas fait un nouveau *retour* au bref de pourvoi pour erreur, au moyen duquel les griefs susdits apparaîtraient.

Cette motion fut plaidée le 18 septembre dernier ; il est surtout un allégué sur lequel l'avocat du prisonnier appela plus particulièrement l'attention de la Cour : c'est que, disait-il, la Cour d'erreur ne juge que d'après le record qu'on lui transmet, sans s'occuper de faits extérieurs ou quelque peu étrangers à tel record. Puisqu'il en est ainsi, répétait-il, la Cour pourra-t-elle rendre la justice qu'en attend le prisonnier, si elle ne fait, auparavant de s'occuper de sa cause, compléter le record, et si elle ne le fait correspondre au désir du bref d'erreur, puisque c'est seulement sur ce record et sur toute la procédure qu'elle peut juger ?

Le procureur de la couronne répondit à cette motion, qu'elle était intempestive, et que ce n'était plus le temps de la faire, mais la Cour fut unanime à dire que si cette motion devait être faite, c'était certainement le temps de la faire, et qu'il n'y avait qu'à juger sur le mérite de la motion. Elle fut donc prise en délibéré.

Le jugement sur cette motion a été rendu le quinze décembre courant ; elle a été rejetée par la majorité des honorables juges, présidant la Cour d'Appel,—l'honorable Juge MONDELET seul étant en faveur de cette motion.

Le 17 décembre, 1863, le Conseil du demandeur en erreur fit une motion pour un bref de *certiorari*, adressé à l'honorable Juge présidant la Cour de première instance, aux fins qu'il lui fut ordonné de transmettre devant la Cour d'erreur, tous et chacun des *record*, *procédure*, *evidence*, ordres, jugement, *venire facias* et liste des petits jurés, ainsi que tous documents ou choses touchant la conviction et sentence de mort prononcée contre Barbinas, le vingt-et-un mars dernier. Et pour raisons de cette motion, il alléguait : Qu'il y avait eu erreur dans l'instruction du procès ; que ces erreurs avaient donné lieu à l'émanation du bref d'erreur émané en la cause, et adressé à l'honorable Juge présidant la Cour de première instance ; qu'en réponse à ce bref d'erreur, il n'avait été produit qu'un certain document intitulé record de conviction, (*record of conviction*) ne contenant que le superficiel de la procédure, sans faire mention des faits qui avaient rapport au fonds du procès ; que, par conséquent, ce *record de conviction* ne répondait qu'en partie à la loi, et au bref d'erreur qui demandait "*toutes choses se rattachant au procès*"; que la Cour d'Appel n'était pas en demeure d'amender et rectifier les erreurs dont on se plaignait, puisqu'elle ne pouvait juger que sur ce qu'elle voyait sur le record, et que sur ce record on avait omis les motifs de pourvoi pour erreur. Qu'ainsi, le record transmis à la Cour d'appel

n'était pas complet ; qu'il fallait pour qu'il fût entier, que le tribunal inférieur transmet : 1^o le record de conviction en harmonie avec les faits de la cause ; 2^o une cédula des procédés accompagnant la conviction ; 3^o tous et tels dossier, procédure, ordre et évidence, ainsi que toutes choses s'y rattachant, de même que le *venire facias*, la liste des petits jurés, ainsi que la liste générale des jurés ; laquelle dernière liste n'avait été déposée que cinq mois après le procès en question au bureau du greffier de la couronne.

À l'appui de cette motion le Conseil du demandeur en erreur citait : Grady and Scotland 332, où il est dit : "*That a writ of error lies where there is error in the foundation, proceedings and judgment.*" En outre le 1^{er} volume de Gude, à la page 264, où il est dit : "*The clerk who must return the same, (bref d'erreur) together with the record, and all proceedings had thereupon.*" Or, disait-il, il ne peut donc rester l'ombre de doute dans l'esprit de la Cour, que le greffier devait produire (*all proceedings,*) toutes procédures qui ont eu lieu au procès. (1)

Il résulte des autorités citées, disait-il, que le bref d'erreur a été légalement émané, or ceci posé, cette Cour doit donc ordonner que ce bref soit exécuté. Et ce bref n'ordonnait-

(1) 4 Chitty, Crim. Law, Engl. Ed. p. 419, cet auteur dit : qu'un bref de *certiorari* émane dans le cas d'un bref d'erreur, et fait voir, que, par le bref même, toutes les procédures doivent être portées devant la Cour d'erreur : "*The tenor of the record and proceedings within written, with all things touching the same &c.*" p. 415, to remove into the Court of K. B., *all the proceedings, records &c.*, à la p. 416, parlant du retour il dit : *hereto (writ of error) and to this record of conviction ARE ANNEXED the PROCEEDINGS which are to be removed by the writ of error* :—1 Chitty, Crim. Law, p. 750 :—Hand's Prac. pp. 44, 464, 474 :—Jacob's Law Dict. vbo. Error, 2d col. vbo. Record says : If the transcript of a record be false, the Court of K. B. will, on motion, order a *certiorari* to the inferior Court :—1 Vol. Gude's Practice, p. 264, et à la p. 266, en parlant du bref d'erreur dit : "*Mr. Marriott certified to the attorney general error in the proceedings, who granted his fiat, and a writ of error issued to remove the proceedings into the Court of K. B.*"—à la p. 267, In cases of felony, upon the proceedings being removed as aforesaid... :—Grady and Scotland, p. 332, dit : "*when a record has been removed..... for Error in fact or in law.....*" et à la p. 334, il dit en parlant de la procédure à suivre pour obtenir le *fiat* du Procureur Général : "*In order to obtain a writ of error, the attorney or party prosecuting prepares a short memorial stating in concise terms the finding of the indictment, and record.....*" To this memorial, if there be error in law, counsel's certificate, or if error in fact, an affidavit verifying the same must be annexed :—2 Bouvier's Law Dict., vbo. Writ p. 665 :—2 Tidd's Prac. 1033 :—1 Brown's Rep., 75 :—6 Brit. C. C. by Denison and Pearce, p. 295 :—4 Vol. Engl. Com. Law Rep., p. 868, of 1856 :—1 Deacon's Crim. Law, p. 380 :—Broom's Max., p. 66 :—Roscoe, p. 225 :—3 Bacon's Abridg. p. 448 :—Bagley, New Prac. p. 515.

il pas au tribunal inférieur de transmettre toutes et chacune des matières se rattachant au procès ?

Au reste, ce bref méritait bien d'être respecté, en tout point, puisqu'il est l'œuvre même du souverain. C'est de sa part un acte de grâce, d'un caractère pour le moins aussi important que l'est de lui la commutation de peine en faveur d'un coupable. Ce bref s'accorde *ex gratia* par le souverain représenté dans la personne de son aviseur légal.

D'ailleurs, en supposant que d'après le droit criminel anglais, les griefs dont se plaint le demandeur n'eussent pas été des moyens ou griefs d'erreur (ce qui n'est pas admis) ; toujours est-il qu'avec notre loi statutaire, il ne peut rester de doute à cet égard ; pour s'en convaincre, il suffit de référer à la sec. 63 du ch. 77 des Statuts Refondus du Bas-Canada, qui s'exprime ainsi :

“ Si dans un exposé en matières criminelles réservé comme
 “ susdit ou porté devant elle au moyen d'un bref de pour-
 “ voi pour erreur, la Cour du Banc de la Reine est d'avis
 “ que la conviction est mauvaise pour quelque raison ne
 “ dépendant pas du mérite de la cause, elle pourra par
 “ son jugement déclarer le fait, et ordonner que la partie
 “ convaincue subisse de nouveau son procès, comme s'il
 “ n'y avait pas eu de procès dans l'affaire.”

Il est incontestable, disait-il, en présence d'une loi aussi positive, que cette Cour avait droit d'être mise au fait des questions qui se sont élevées au procès ; ces questions pouvaient être portées devant la Cour d'erreur soit au moyen d'un bref de pourvoi pour erreur, soit au moyen de questions réservées. Ce mode était donc le seul que le demandeur en erreur avait par son bref d'erreur. D'après les secs. 57 et 58 du même cap. 77, les questions élevées au procès sont à la discrétion de la Cour ; or, dans l'espèce actuelle, la Cour ou le tribunal de première instance n'ayant pas cru devoir réserver à la considération de cette honorable Cour la question, la grave question, de savoir, si le résultat de l'analyse chimique des matières en question,

devait être connu aux jurés, eux, qui avaient déjà été saisis des matières, avant leur analyse. Cependant, d'après la section 63 ci-dessus, le demandeur avait le droit de faire décider le mérite de cette question, au moyen du bref d'erreur; or, comment, en présence de ces faits, l'émanation du *certiorari*, pouvait-elle lui être refusée, en lui refusant, c'est évidemment lui enlever le droit de faire connaître ses moyens d'erreur, car, le demandeur, avec le *record tel qu'il est*, est sans moyens d'erreur, ainsi pourrait-on sans cela lui rendre la justice qu'il réclame, et qu'il a droit d'avoir ?

En Angleterre, comme l'on sait, les moyens ou griefs d'erreur étaient généralement pris sur les actes d'indictment. Ici, d'après notre loi ch. 99, sec. 21 des Stat. Refondus du Bas-Canada, ces moyens sont pour ainsi dire disparus, puisqu'il n'existe aucune formule quelconque dans la rédaction des actes. (indictment.) Il est en outre permis, en tout état de cause, de faire des amendements aux indictments, de plus, les informalités ne vicient ni n'invalident ces actes en aucune façon.

Notre législature n'a pas cependant fait main basse sur les brefs d'erreur, au contraire, il est démontré jusqu'à l'évidence, qu'elle a augmenté les moyens de griefs d'erreur, tel qu'il appert par la dite sec. 63 des Statuts Refondus du Bas-Canada, ch. 77. D'après cette section, la législature a, pour ainsi dire, donné un droit assimilé à celui d'un appel ordinaire.

Maintenant, disait-il, il me sera facile de démontrer qu'il n'y a aucune formule sacramentelle à suivre ou à adopter dans la rédaction du *record of conviction*. D'abord, Archbold, Criminal Pleadings, page 163, donne pour un *record of conviction*, une formule qui est tout à fait différente de celles données par Gade, Chitty, Hand et autres, ce qui démontre que cette formule de *record*, varie selon les faits et circonstances de la cause ; ce fait est, au reste, rendu tangible par le *record of conviction* dans la

cause de Mansel, 1 vol. Dearsley and Bell, p. 375, dans lequel *record of conviction* apparaissent toutes les objections faites lors du procès.

Ici donc, comme partout ailleurs, l'on devait au moins faire apparaître les matières de fait se rattachant à l'issue, et comme faisant les moyens ou griefs d'erreur. Donc, le *rapport du bref* à cette Cour, est illusoire, il comporte même un mépris fait à la haute autorité qui l'a ordonné.

Ainsi, cette Cour doit s'enquérir de la vérité, et elle ne peut le faire raisonnablement qu'en ordonnant la transmission de *toute la procédure* au moyen du bref de *certiorari*. Jusqu'alors, elle sera dans l'ombre et ignorera ce qui a été fait au préjudice des droits du demandeur en erreur.

Enfin, quant à la dernière question élevée par la motion, se rattachant aux nullités dont le demandeur se plaint, il alléguait : Que les jurés n'avaient pas été légalement constitués, que la liste générale des jurés n'avaient été déposée au bureau du greffier que cinq mois après le procès, tandis que, selon la loi, elle devait y être déposée incessamment pour l'information du public ; qu'aucune loi, ni dans nos statuts, ni ailleurs, ne démontre le contraire. Et à l'appui de cet allégué : Il est important, disait-il, que toutes les formalités prescrites pour la constitution d'un corps de jurés, soient remplies ; et elles sont si essentielles, qu'un prisonnier peut se plaindre de la moindre irrégularité dans les formalités prescrites pour la constitution de ce corps. En effet, dans nos Cours criminelles, il y a deux juges, le juge présidant la Cour, et le juré ; or, si on a tant de circonspection dans le choix du premier, si on prend tant de soin à chercher une garantie dans sa science, son intégrité, et son passé, sera-t-on moins scrupuleux lorsqu'il s'agit de constituer en juge le juré qui n'a pas de garantie dans son passé, inconnu peut-être jusqu'alors, et qui aura seul, par le pouvoir qu'on lui confie, le droit de juger de la vie ou de la mort de son semblable, sans aucune responsabilité ?

Le Statut Refondu, cap. 84, secs. 8, 10, 15, 17, 23 du Bas-Canada, oblige à l'accomplissement en termes positifs, de toutes et chacune des obligations et formalités qu'il impose pour la constitution ou choix du jury.

Les peines rigoureuses que cette loi inflige contre un grand nombre de personnes, et particulièrement contre la personne du shérif, font voir clairement que la législature a voulu que les moindres formalités fussent observées ; ces peines sévères sont imposées contre ces personnes pour les moindres fautes ou négligences qu'ils peuvent commettre.

La sec. 48, inflige au shérif un maximum d'amendes de deux cent quatre-vingt piastres, et cinquante piastres contre les personnes qui refusent de lui donner des renseignements touchant les personnes dont il doit faire choix comme jurés.

Les secs. 20 et 21, statuent que les listes des jurés ne pourront être changées ou allérées que sur l'ordre de la Cour, et ce, sur plainte faite à cet effet.

Il est donc évident, ajouta-t-il, qu'il n'existe et ne peut exister aucune loi qui fasse main basse sur quelque une des formalités se rattachant à la formation et constitution du corps de jurés, et que celles qui régissent la formation de ce corps sont pleines de sagesse.

Le chapitre 99, sec. 85 des Statuts Refondus du Canada, n'a rien changé, et n'aurait pu rien changer aux exigences du dit ch. 84, qui sont de principe, et non de pure forme.

Cette sec. 85, fait bien disparaître, à la vérité, certains défauts de forme dans l'assignation du jury, mais elle ne va pas au-delà, et elle ne pouvait y aller, car autrement, nous tomberions dans l'arbitraire, il n'y aurait plus de sûreté pour la société ; et comment dans le cas actuel, cette sec. 85 aurait-elle pu *légaliser* les jurés assignés et pris sur la liste générale, qui n'a été déposée au bureau du greffier de

la couronne, que cinq mois après le procès en question, qui est une violation manifeste de la loi, et par là une injustice grave faite au malheureux condamné. En présence de ces faits il n'y a pas besoin de commentaires.

Finalement, le conseil du demandeur en erreur cita à l'appui de ses prétentions, une cause, dans laquelle il y avait similitude frappante avec la présente, laquelle est rapportée au 2e vol. Parker's Criminal Reports, page 148, dans cette cause un bref de *certiorari* fut émané et enfin le jugement infirmé, il avait donc lieu d'attendre le même résultat.

Enfin résumant son allocution il dit qu'il avait démontré :

1o. Que d'après le droit criminel anglais, et nos statuts, il y avait cause à bref d'erreur, et que ce bref était légalement émané ;

2o. Que par aucune loi il n'y a aucune formule *sacramentelle* à observer dans la rédaction du *record of conviction*, qu'ainsi le record de conviction devait être en harmonie avec les circonstances de la cause, et que, ne l'étant pas, il devait être amendé ;

3o. Que le défaut dans la constitution du jury, était absolu, et que sur le tout, la motion pour bref de *certiorari* devait être accordée, afin de fournir au demandeur en erreur un moyen de faire valoir ses griefs d'erreur, et de lui faire rendre justice.

LÉGARÉ, qui représentait la couronne, soutint que la section 85, du chapitre 99 des statuts du Canada avait pour effet de mettre à néant les objections faites par le prisonnier, et les défauts (si aucun il y avait,) se rattachant à l'assignation des jurés, vu le verdict et la sentence portée contre Barbinas ; que pour aucune des raisons mentionnées en la motion du demandeur en erreur, le bref de *certiorari* demandé ne pouvait être obtenu.

MONDELET, Juge :—Il s'agit, sur motion du demandeur en erreur, condamné à mort, sur conviction du meurtre de sa femme, par empoisonnement, de nous prononcer sur trois questions, savoir :

1o. Les notes des témoignages n'ont pas été, au procès, prises par le juge président la cour, mais, par un étranger qui n'était pas sous serment.

2o. Les jurés se sont retirés, sans qu'il soit constaté qu'ils aient été gardés dans une chambre sous clef, et sans être sous la garde d'huissiers assermentés, tel que l'exige la loi.

3o. Qu'il appert aux procédés de la séance du dix-neuf mars dernier, que le nommé Moïse Forest avait été entendu comme témoin de la défense, et qu'ayant produit, devant la Cour, deux bardeaux et une gazette sur lesquels avait été l'arsenic mentionné au procès, comme moyen de défense, le tout fut montré aux jurés de l'agrément et consentement de la Cour ; qu'au même instant, l'honorable juge, président la Cour, ordonna au Docteur Larue, présent à l'audience, de faire, aux frais de la Couronne, l'analyse chimique des matières contenues sur les deux bardeaux produits par le témoin Forest ; qu'en effet, l'analyse fut faite au désir de l'ordre de la Cour : (Suit l'entrée faite sur le registre des procédés de la cour "*Moïse Forest produces two shingles and a newspaper upon which there was said to be arsenic, Court orders Doctor Larue to analyse them.*") Qu'en conséquence de ce que dessus, l'honorable Juge suspendit la séance de la Cour pendant trois heures environ, pour attendre l'analyse chimique du Dr. Larue.— Que le Dr. Larue a fait l'analyse chimique ordonnée, comme dit est, a fait un rapport lequel n'a pas été ouvert et publié en Cour, le résultat n'en a pas été connu aux jurés, pour la raison que le procureur de la Couronne déclara qu'il n'entendait pas se servir du dit rapport, ou entendre le dit témoin.

Cette motion qui en est une *for diminution of the record*, est l'unique procédé devant nous ; plus tard, si elle est ac-

cordée, nous pourrions être appelés à décider si les raisons d'erreur sont telles que nous les dûssions accueillir. Pour le présent, il ne s'agit que de faire compléter le record ou rapport, voilà tout. Sur le premier moyen, je pense que bien qu'il soit préférable que les notes des témoignages soient prises par le juge même, et qu'il devrait toujours le faire, néanmoins cette omission de sa part, n'est pas une chose qui doive engager cette Cour à en ordonner la mention au record.

Quant à la garde des jurés par des constables, ça doit se faire, mais je ne vois pas que nous devrions ordonner que mention de cela soit faite au record, nous devons plutôt présumer que tout a été régulièrement fait à cet égard.

Il en est tout autrement quant au troisième moyen. Il est allégué que le rapport du record n'est pas complet, et nommément, qu'une partie essentielle des procédés de la Cour, et entre autres, l'ordre même de la Cour, que les bardeaux et la gazette produits en Cour, et le contenu, (savoir l'arsenic) fût analysé par le Dr. Larue, ne sont pas mentionnés au record ou rapport fait à cette Cour, des procédés par le greffier de la Couronne, ainsi que le fait de la production du rapport de l'analyse chimique, et du fait que ce rapport n'a pas été ouvert et communiqué aux jurés.

Il ne faut pas perdre de vue, que le procédé que le demandeur en erreur se plaint n'être pas mentionné au rapport, est un procédé de la Cour même, qu'elle a adopté, ordonné de son propre mouvement, et pour l'accomplissement duquel, elle a, est-il allégué, suspendu la séance durant trois heures. Certes, si ce procédé n'en est pas un qui doit apparaître au rapport, surtout lorsqu'il a été, comme il est allégué, entré au registre même de la Cour, je ne comprends plus quel moyen un prisonnier peut avoir de se faire rendre justice devant cette Cour, avec un précédent dont le résultat peut être, et serait ici, de, le faire

monter à l'échafaud. S'il ne s'agissait que de quelque décision qu'aurait rendue la Cour, ou des objections à des questions proposées aux témoins, l'on comprend, car c'est une chose élémentaire, l'on comprend que le writ d'erreur ne serait pas accueilli par cette Cour. Mais ici, c'est toute autre chose. En effet, n'est-ce pas un "*substantial proceeding on the trial* ?" n'est-ce pas le procédé même de la Cour ? Et la suspension de la séance, durant trois heures, pour obtenir une analyse chimique, laissant, durant ces trois heures, les jurés en proie à toutes les suppositions et les conjectures imaginables quant à la quantité d'arsenic qui était tant sur la gazette que sur les bardeaux, seront-ils traités d'enfantillage, d'inutilité, de farce judiciaire ? Je ne puis, pour un instant, accueillir une pareille prétention, qui, suivant moi, traiterait, aussi légèrement que cela, un ordre solennellement prononcé par une Cour, durant des procédés dont le résultat doit être d'absoudre un accusé, ou de l'envoyer à la mort. Cela ne se trouve pas dans les livres, a-t-on dit, il n'y a pas de précédent ! Mais cela ne se trouve-t-il pas dans la raison, dans la justice ? Est-ce que les lumières de la raison que l'homme a reçues de son Créateur, ne lui révèlent pas ce qui en doit être ? Incontestablement ! Mais, dit-on encore, on ne mentionne jamais ces choses là sur l'indictment, non plus que dans le record ou rapport que le tribunal inférieur fait des procédés à la Cour du Banc de la Reine, devant laquelle un condamné se pourvoit en vertu d'un *writ of error*. Soit : mais du moment que ce qui, peut être, n'est jamais arrivé à lieu, pourquoi ne le mentionnerait-on pas ? Et si on n'en fait pas mention dans le rapport, quoique ce soit entré au registre, me dira-t-on qu'il faut, de propos délibéré, refuser que cette entrée au registre en vertu d'un ordre, d'un *fiat* de la Cour même, apparaisse au rapport et soit soumis à la considération de la Cour ? Je ne puis souscrire à une pareille doctrine. Je suis d'autant plus opposé à ce qu'on ferme ainsi péremptoirement au prisonnier la porte de la justice, pour lui ouvrir celle de l'éternité, en le faisant passer par l'échafaud pour s'y rendre, que sans le moindre

effort d'imagination, l'on peut arriver à la supposition bien naturelle et bien raisonnable, que si le rapport de l'analyse chimique avait été produit, le jury aurait peut-être eu la preuve que toute la quantité d'arsenic constatée avoir été achetée par le prisonnier, avait été déposée sur les bardeaux et la gazette, et par conséquent, l'arsenic qu'on a trouvé dans l'estomac analysé de la femme du prisonnier, a pu y être introduit ou par elle-même, ou par quelqu'autre personne que le mari, ou par accident quelconque. Pourquoi ne produirait-on pas le rapport au procès ? L'ait-on ouvert en secret ? Que contenait-il ? Était-il défavorable à l'accusé ? Il était du devoir de la couronne d'en faire usage dans l'intérêt de la société en général. S'il était favorable au prisonnier, de quel terme qualifierais-je la suppression qu'on en aurait faite ? D'ailleurs, l'ordre de la Cour entré au registre, partie intégrale du procès, demeurerait, par là même, sans exécution. Il y en a la preuve par écrit, et on refusera d'en avoir le rapport !

Je vais plus loin : n'y eut-il eu qu'un doute, un doute raisonnable à cette occasion, c'eût été du devoir de le dire aux jurés, et à ceux-ci d'agir en conséquence. La Cour, dis-je, n'aurait pas manqué de rappeler aux jurés, que dans une semblable circonstance, je veux dire le doute, l'accusé doit être acquitté ; et un verdict de "**NON COUPABLE**," au lieu de celui de "**COUPABLE**," eût été le dénouement du procès.—Cette seule considération m'effraye, et n'y eut-il d'autre raison que celle-là, elle devrait, à mon avis, être plus que suffisante pour engager cette Cour, à qui on a dit qu'il n'y a pas de précédent, d'en faire un. Pas de précédent ! Mais avant le premier précédent en aucune cause ou matière, y en avait-il ? N'a-t-on pas commencé par le premier, avant d'arriver au second ? Pas de précédent ! Quoi ! On va faire étrangler un homme qui, avant d'être condamné à mort, s'est plaint à la Cour de ce qu'il soumet à celle-ci, et a été accueilli par un refus, et une condamnation à mort, et cela parce que l'on ne trouve pas de précédent !

S'il n'y en a pas, je le dis encore, faisons-en un, et avant de confirmer la condamnation à mort, assurons-nous des procédés qui ont eu lieu, c'est le moyen de savoir si la conviction et la condamnation peuvent soutenir l'éclat de la lumière. Ne les laissons pas dans les ténèbres, de peur que cet infortuné ne soit privé du bienfait qu'il attend de l'influence du soleil de la justice ! Pas de précédent ! mais, n'est-il pas vrai qu'à l'occasion de la simple récusation d'un juré, et l'ordre de la Cour sur ce, l'on peut se pourvoir par writ d'erreur ? Et cependant ces procédés ne sont pas entrés sur l'*indictment*, mais bien dans le registre ou le livre de procédés que tient, en Cour, le greffier de la Couronne ! Va-t-on comparer ces procédés à celui dont il est question, duquel dépend le sort du prisonnier ?

If the whole record be not certified, or not truly certified, by the inferior Court to which the writ of error is addressed, the plaintiff in error, as well in criminal as in civil cases, may allege a diminution of the record, showing that part of the record has been omitted, and remains in the inferior Court not certified, and a CERTIORARI will be awarded. (1)

Peut-on, avec vérité, affirmer que tout le record a été certifié et transmis à cette Cour, *and that no part of it remains in the inferior Court not certified* ? Au contraire, n'est-il pas allégué qu'une partie *substantielle* "*a substantial proceeding at the trial*" a été omise dans le rapport ? Ne suffit-il pas qu'on nous informe de cela pour nous faire une loi, surtout quand il s'agit de la vie ou de la mort d'un de nos semblables, de nous assurer du fait ? Il ne peut en résulter, d'ailleurs, aucun mal ; dans le cas contraire, le prisonnier monte à l'échafaud. Sans attribuer aux termes dans le writ d'erreur, "*you send to us, in our Court of Queen's Bench, for Lower Canada, aforesaid, sitting at the city of Quebec, distinctly and PLAINLY under your seal, the record and process aforesaid, with ALL THINGS TOUCHING THE SAME,*" une signification illimitée, et par là même déraisonnable,

(1) Archbold's Pleading and Evidence (14 E. p. 169.)

je suis d'avis que ces mots "*all things touching the same*" signifient "*those things which are essential and which may enable the Court of error to do justice, and without which full justice might not be done.*" Ne serait-ce pas une erreur palpable, que de prétendre que les seules choses dont puisse ou doive s'occuper cette Cour sont la mention de l'*indictment*, la soumission de cet acte d'accusation aux grands jurés, leur rapport, le plaidoyer du prisonnier, la fixation du procès, le verdict du petit jury, et la sentence ? Et pourtant, voilà où nous conduit la prétention de la Couronne ! Secouons donc, sans hésiter, la poussière des précédens. Sortons donc, au moyen de la lumière de la raison, des ténèbres où nous demeurerions, faute de précédens, et prenons les moyens de rendre justice à celui qui l'attend de cette Cour ; et si plus tard, le prisonnier a à subir la peine de mort, qu'il passe de cette vie à l'autre, la conviction dans l'âme, que tous les moyens humains pour lui faire rendre justice, ont été épuisés, et qu'il ne l'attend plus que de celui qui la rend toujours.

Quant à cette Cour, qui n'a à s'occuper que de ce qui lui est soumis juridiquement, et qui ne peut convenablement exprimer d'opinion quant à ce que doit faire l'Exécutif qui seul aura le droit d'agir à l'égard de la conviction et de la sentence de mort prononcée contre le prisonnier, il demeurera acquis à sa conscience, le fait important, qu'elle aura pris les moyens de s'assurer si le procès a été complet, et la société qui y a un droit incontestable, aura la certitude, que si on a retranché de son sein un de ses membres, on ne l'a fait qu'après s'être bien assuré que le verdict du jury ne pouvait être autre que celui qu'il a prononcé, et que l'exécution qui suivra la sentence de la Cour, aura été le résultat légitime d'un procès dont aucune partie n'a pu laisser entrevoir aux jurés un doute raisonnable, et un moyen de se rendre compte de la mort de la femme du prisonnier, autrement que par le fait de ce dernier.

Je suis donc d'avis que la motion devrait être accordée. Je suis seul de cet avis ; mon dissentiment devra, par conséquent, être entré.

Je dois à l'Honorable Juge Stuart, qui a présidé lors du procès, de déclarer que je lui tiens compte du talent, du zèle, et des sentiments d'humanité qu'on lui connaît, et si je ne puis approuver la non production au procès, du rapport du docteur Larue, de l'analyse que l'honorable Juge est allégué avoir ordonné, j'en attribue la cause uniquement à une erreur : *humanum est errare*. A l'égard du record ou rapport par le greffier de la couronne, c'est son acte, et non celui de l'honorable Juge.

Quant à la majorité de cette Cour dont le jugement va renvoyer la motion contre le prisonnier, sa décision solennelle doit juridiquement faire présumer que je suis en erreur ; je voudrais, mais je ne puis me le persuader, encore moins m'en convaincre, malgré le respect qu'inspirent les talents et les connaissances si bien connus de mes quatre honorables collègues.

MEREDITH, Justice :—The present is, I believe, the first instance, in which a record in a criminal case, has been brought under the consideration of this Court by a writ of error. The Court is thus called upon for the first time, to pronounce upon the nature and extent of its jurisdiction as a Court of error in criminal cases ; and although I cannot say that the case before us has presented any serious difficulty to my mind, yet, considering the novelty and great importance of the subject, and the dissent just expressed by my brother Mondelet, I think it right to explain fully the reasons which induce me to concur in the judgment now about to be rendered in this cause.

The main complaint of the plaintiff in error, is that a report of an analysis alleged to have been ordered by the Court, in the course of the trial, was not placed before the jury, as, it is said, it ought to have been ; and, in adjudicating upon this complaint, we must necessarily determine

whether the whole, or any part of the evidence in the Court below, or the rulings of the presiding Judge in relation to it, can be brought under the revision of this Court, by a writ of error. Archbold, laying down the general rule respecting proceedings in error, says: "A writ of error lies for every substantial defect appearing on the face of the record, for which the indictment might have been quashed, or which would have been fatal on demurrer, or in arrest of judgment." (1)

According to the foregoing authority, which agrees with what is to be found in other works on the same subject, (2) a writ of error is the proper remedy for certain substantial defects (3) appearing on the face of the record.

It is therefore of importance to know what part of the proceedings in the Court below, ought to appear on the face of the record, returned in obedience to a writ of error.

As to this point, the answers of the English Judges to certain questions put to them by the House of Lords in the case of Mellish and Richardson, (4) may I think be referred to, with advantage, as explaining, generally, the nature of proceedings in error; although, it is to be borne in mind, those answers were given in a civil case. Chief-Justice Tindal, delivering the opinions of the Judges, in that case, observed: "The proper object of a writ of error is to remove the final judgment of the Court below for the revision of the Superior Court, in order that such Court from the premises contained in the record of the Inferior Court, may either affirm or reverse the judgment, as they draw the same, or a different conclusion, from that which has been pronounced by the Court below.

"These premises" (the learned Chief-Justice added) "are

(1) Archbold's Crim. Pl., Edition of 1859, p. 164.

(2) 4 Blackstone, 391 :—Archbold, Practice in Crown Office, page 200 :—Archbold Criminal Procedure, page 198.

(3) See as to certain formal defects, cap. 99, C. S. C. secs. 84, 85, pp. 1027, 1028.

(4) 9 Bingham, page 127 :—Vol. 22, E. C. L. R., page 276:—See also Chitty's General Practice, Vol. 2, page 572.

"the pleadings between the parties; the proper continuance (1) of the *said suit* and *process*; the finding of the jury upon an issue, in fact, if any such had been joined; and lastly the judgment in the Inferior Court."

"All the premises, from which such judgment has been derived, the parties to the suit below have the right, *ex debito justitiæ*, to have upon the record." And in the course of the same judgment the learned Chief-Justice further observed: "So strictly has the law considered that the pleadings in the suit, and the judgment proceeding thereon, shall form the only grounds of the record, that when it was found expedient that the opinion, in point of law, of the Judge who tried the cause should be made the subject of revision by a Superior Court, the Statute of Westminster, the second, (13 Edward I) expressly gave authority for that purpose by a bill of exceptions."

I have not been able to find any direct or positive statement as to what should be contained in the record of a criminal case returned in obedience to a writ of error; but on reference to the forms of record in criminal cases given by the most esteemed writers, for instance Blackstone, (2) Chitty, (3) Gude, (4) and Archbold; (5) we find that they agree in substance, (6) with the record before us; and, with reference particular to the present case, I may observe that none of those forms contain the notes of evidence, or any of the rulings of the Judge at the trial.

It will, also, be found, upon reference to the important cases before Courts of error, of which reports are within our reach, that no attempt, even, appears to have been made to obtain the revision by a Court of error, of any of the rulings of the

(1) As to continuance in our Court, *vide* cap. 77, Con. Stat. L. C. Sec. 78.

(2) 4 Blackstone, appendix. [1]

(3) 4 Chitty, Crim. Law, p. 389.

(4) 2 Gude, p. 208.

(5) Archbold, Crim. Proc., Ed. of 1852. p. 193.

(6) There is a difference as to the form in which the record is certified to the Court, but, upon this point, we have not been called upon to express, and do not express, any opinion.

Court of original jurisdiction, upon questions of evidence. In the well known case, for example, of Daniel O'Connell and others, (1) in which the most distinguished members of the bar of England and Ireland were engaged, during the trial, which lasted twenty four days, a great number of objections were urged against the evidence adduced on the part of the Crown ; and one of those objections was decided against the prisoners, by two Judges against one ; (2) yet according to the reports of the proceedings before the House of Lords, no notice appears to have been taken of the objections so urged, nor of the decisions respecting them ; and this, it seems to me, can hardly be accounted for otherwise than by supposing that it was deemed impossible, by the eminent counsel engaged in that case, to bring such matters under the consideration of a Court of error.

It may, at first sight, appear strange, perhaps even unreasonable, that, in a criminal case, the directions of the Judge to the jury, and the rulings of the Court, upon questions of evidence, cannot be brought under the consideration of the higher tribunal by a writ of error ; but the impossibility of doing so under our present system of proceeding, can, I think, be easily demonstrated.

The directions of the Judge to the jury, are given orally, and, therefore, without some special provision, cannot be subjected to revision in another Court.

It is true, notes of the evidence are taken by the Judge, who also enters his rulings upon objections to the evidence ; but the notes of the Judge remain in his possession, they form no part of the record, in any sense of the word ; and therefore, even if there were no other reason, cannot be returned as part of the record. In England, *in civil cases*, where a party thinks fit to object on the ground of evidence having been improperly admitted or rejected, or on account of any misdirection to the jury, he has, under the statute in that

(1) 1 Cox. 413 :—See also Smith O'Briens case, 3 Cox. 361.

(2) 1 Cox. 405.

behalf, a right to a bill of exceptions, (1) by means of which the ruling or direction objected to, and the evidence, so far as necessary, are reduced to writing, and thus, in effect, made part of the record, so that the ruling or direction impugned may be subjected to revision by a writ of error.

In cases of Treason and Felony there cannot, it is certain, be a bill of exceptions; (2) there is therefore, in such cases, no mode of causing the rulings of the Judge upon questions of evidence, or his directions to the jury, to be made part of the record; and consequently it is simply impossible to have such rulings or directions of the Judge during the trial reviewed under a writ of error. (3)

It is true, as has been observed by my brother Mondelet, that the improper allowance or disallowance of a challenge may be taken advantage of by writ of error; but strictly speaking there ought to be an answer in law or in fact to the challenge, and a judgment upon the issue raised. When, therefore, the proceedings upon a challenge are regular there can be no difficulty as to their being returned as part of the record, so as to be reviewable under a writ of error; and where the proceedings upon a challenge have not been regularly made a part of the record, although they may have been returned as such, the weight of authority seems to be in favour of the opinion that they cannot be made ground for a writ of error. (4)

From these general remarks, as to the proceedings that ought to make part of the record in a criminal case, I now

(1) As to proceedings in Civil Cases in L. C., *vide* secs. 33, 34, 35.

(2) Archbold, Crim. Pl. page 148, "In cases of Treason and Felony a Bill of exceptions has never been allowed." As to cases of misdemeanor. See D. & B. page 412, and particularly *errata et addenda* p. XII, where Lord Campbell is reported to have decided against granting bill of exceptions, even in case of misdemeanor.

(3) Grady and Scotland, Practice of the Crown Office, page 333. In cases of Treason and Felony there can be no writ of error, in respect to objections in law raised at the trial, the provisions of the 13 Ed. 1, C. 31, as to the tendering of bill of exceptions, not applying to such cases; *vide*, also, 1st Chitty, Criminal Law p. 622.

(4) See opinion of Willis J. and Barons Bramwell and Channel, in Mansell's case. D. & B. 420, 422, 425.

pass to the consideration of the particular matters respecting which the plaintiff in error desires the record before us to be amended.

The first objection urged, is as to the manner in which the notes of evidence were taken at the trial. This, however, is not a matter upon which we can be called to adjudicate ; inasmuch as the notes of the learned Judge of the Court below, as has been already observed, form no part of the record, and therefore cannot, *for any purpose*, be brought before us under Writ of Error. All the Judges agree in considering this point as free from difficulty ; but as it has been raised, I may, in order to prevent misapprehension, observe, that although it is doubtless usual for the Judge, presiding in a criminal case, to take notes of the evidence himself ; yet that there is nothing in the law to prevent him from having the notes of evidence taken in the writing of another person, where he finds it necessary to do so ; and I myself have seen this done in several instances.

The second objection urged by the plaintiff in error, is, that it does not appear that the jurors when they retired at the Judge's charge, were in the custody of sworn constables.

This, also, is a matter which all the Judges agree in saying, need not appear on the face of the record. The precautions taken for the safe keeping of the jury are of course noted by the clerk in the register ; but they form no part of what is technically known as the record. Moreover, it is no part of the duty of a Court of error to determine upon the sufficiency or insufficiency of those precautions. It is for the presiding Judge, with the assistance of the officers of the Court, to exercise his discretion as to the means to be taken for the safe keeping of the jury ; and in doing so he may, and indeed must, take into consideration the situation and construction of the room in which the jurors are placed, and other local and special circumstances—circumstances, about which a court of error, as such, can have no knowledge.

The third objection urged by the plaintiff in error, has reference to a report of an analysis, made, it appears, in the course of the trial by Dr Larue. This is the point upon which unfortunately the Judges of this Court are divided; and yet it seems to me, I say it with all deference, that, agreeing as we do with respect to the remainder of the case, there ought not to be any difference of opinion here. According to the plaintiff in error, the report of Dr Larue ought to have formed part of the evidence. But if, as is admitted by all the Judges, we are not to have before us the notes of the Judge, which contain the main body of the evidence, why should we have the report of Dr. Larue, which could not be produced at all, except as forming part of the evidence.

Dr. Larue, it seems, analysed something found upon two shingles and upon a newspaper. But to what purpose ascertain whether the matter on the shingles and newspaper was arsenic, unless we have, at the same time, the Judges notes to show whether the matter so analysed, was ever in the possession of the prisoner. Again, to what purpose ascertain the quantity of arsenic found on the shingles and newspaper, unless we have the notes of the Judge to show, what quantity of arsenic was traced to the possession of the prisoner.

If it be said that what is wanted, is not the Report of Dr. Larue, but the entry said to have been made respecting it, in the register of the Court below; that would make the matter, if possible, plainer still; for what end could be attained by the production of the mere entry in the register respecting the report, without the report itself, and without the evidence of which the report, it is contended, ought to have formed a part.

The learned Judge, who presided at the trial, might, of course, have been asked to reserve a question for the consideration of this Court, as to the right of the prisoner to have the report in question placed before the Jury; and if

there had been any room for doubt; as to the right of the prisoner in that respect, the application would we may feel confident, have been acceded to; and then, if necessary, we could have had not only the report, but the whole of the evidence before us; not indeed as part of the record, but as part of the case reserved and submitted. No such application was made and I am clearly of opinion that by a reserved case, only, could evidence in the Court below, including the report in question, and the rulings of the learned Judge, in relation to it, be properly brought under the consideration of the Judges of this Court.

Before leaving this branch of the case, I may observe that no case has been cited, or so far as I know can be cited, in which a writ of error, was ever allowed in England or Ireland, on account of matters such as those in relation to which the plaintiff in error desires the return before us to be amended.

It has however been said that if there be no precedent for the granting of an application such as the present, we ought to make one. That proposal, however, is not likely to receive the sanction of this Court; because we could not give it effect without exceeding the limits of our jurisdiction, and arrogating to ourselves powers to which we have not even the semblance of a just claim.

The unreasonableness of allowing a right of appeal, in any civil case of importance, and yet of refusing the same right in criminal cases, even where life is involved, has been very strenuously pressed upon our attention. But this, it is obvious, is a matter for the consideration of the Legislature. Our duty is to apply ourselves to ascertain the extent of the powers confided to us, and then to discharge, to the best of our ability, the duties which accompany those powers. It is however satisfactory to us to know that, as to the matters under consideration, Her Majesty's subjects in Lower Canada, have the same means of ob-

taining justice in criminal cases, that are afforded to their fellow subjects in the mother country. Here, as in England, "substantial defects, appearing on the face of the record," may be reviewed under a writ of error. Here, as in England, the Court trying a case, may, in its discretion, reserve "any question of law which has arisen on the trial" for the consideration of a higher Court.

But neither here, nor in England, is the right of appeal allowed to the same extent in criminal cases, as it is in civil cases.

Whether the law ought to be changed in this respect has been much discussed in England. In the year 1848, the House of Lords appointed a committee to consider a bill called, "The criminal law amendment bill;" and in the course of the proceedings before that committee, Lord Lyndhurst, Lord Brougham, Lord Denman, (then chief justice of the Queen's Bench) chief Baron Pollock, and eleven other members of the English Bench (1) stated very decidedly their opinion against an appeal in criminal cases. Since that time several bills have been introduced in the imperial Parliament for the purpose of giving an appeal in cases of Treason and Felony; but it appears only one of those bills was allowed to advance beyond the first reading, and, as I believe, the last two bills on this subject, namely those of 1860 and 1861, were thrown out without a division. I think therefore it may be safely said, that in England, not only the weight of authority, but public opinion, is in favour of the existing law.

Whether a change in our law on this subject is desirable, is, as I have already said, a matter for the consideration of Parliament; and I should hardly have deemed myself justified in alluding to it, as I have done, had it not been for

(1) Namely, Judges Coleridge, Patteson, Wightman, Erie, Coltman, Maule, Cresswell, Williams, Barons Rolfe, Alderson and Parke.

The witnesses in favour of the allowance of an appeal in criminal cases were Sir F. Kelly and M. Green.

the opinion expressed by my brother Mondelet, as to the necessity of bringing this subject (the importance of which cannot be overrated) under the consideration of the Legislature

Returning then from this, I trust excusable digression, to the case before us, after devoting to it the most careful consideration, I have come to the conclusion that we cannot cause any amendment, or entry of any kind to be made in the record, respecting the matters of which the plaintiff in error complains, and I therefore think his motion must be rejected; not merely however (as has been represented) because we cannot find a precedent to justify us in granting it; but because the matters sought to be brought under our notice, are clearly beyond our jurisdiction.

Duval, Justice :—In this case the party has clearly mistaken his remedy. We do not exercise the powers of a Court of appellate jurisdiction, our's is a limited jurisdiction. We are confined to errors apparent on *the face of* the record, we can not consider errors extrinsic from the record. Of the errors assigned in argument in support of the motion, not one appears on the face of the record. In a civil case, in virtue of a comparatively recent Statute, the party may file a bill of exceptions, stating at length the errors he complains of, this bill of exceptions is annexed to the record, and sent up with it. By means of it, the errors complained of may be brought under the consideration of the Court above.

In cases of felony, the bill of exceptions is unknown to the law of England. Therefore, however well founded might be the errors complained of, a writ of error could afford the prisoner no relief. On this head there ought to be no difference of opinion; for not a single book of authority, not an opinion or dictum of an English judge or lawyer can be referred to expressing the slightest doubt on the subject. We may with confidence refer to books of practice, where will be found the requisites of a record as made up in En-

gland, and sanctioned for more than a century without a dissenting voice. I therefore repeat what I have above stated, and what is decisive of the question : On a writ of error, our powers are limited, we must confine ourselves strictly to the errors apparent on the face of the record. Had we the powers of a Court of Appellate Jurisdiction, we might call for a return very different from that now before us. Such Appellate Jurisdiction we have not, and when, a few years back, an attempt was made to obtain a law of the Imperial Parliament, allowing such appeal, it met a decided opposition from some of the most eminent and experienced men in the profession.

La motion pour *certiorari* fut renvoyée par la majorité des Juges présidant la Cour. Le Juge Mondelet s'exprima en faveur de la motion pour *certiorari*, comme il l'avait fait en faveur de la motion pour un nouveau rapport au bref d'erreur, de même qu'il avait formellement donné son dissentiment et sa non-participation au jugement rendu le 19 décembre, 1863, confirmant le jugement de la Cour de première instance, et ordonnant que le condamné fut remis sous la garde du shérif du district d'Arthabaska, jusqu'à ce qu'il en fut déchargé.—Vu le rejet des deux motions susdites, l'avocat du prisonnier déclara que puisqu'il en était ainsi, *il ne pouvait produire ses griefs d'erreur* pour les raisons exprimées dans les deux motions, savoir : celle pour un nouveau rapport au bref d'erreur, et celle pour *certiorari*.

Lors du jugement sur la motion pour *certiorari*, le 18 décembre, 1863 :—Le Juge-en-chef a exprimé le regret de ce qu'au terme de cette Cour, tenu en Juin dernier, personne n'ait comparu, pas même de la part de la couronne. Que cette abstention, de la part de la couronne, de comparaître ainsi, au susdit terme, était de nature à faire naître, dans l'esprit du malheureux condamné, l'espoir qu'il aurait *au moins* la vie sauve. Il est donc à espérer que cette circonstance sera prise en considération par le gouvernement Exécutif, avec d'autres circonstances qu'il sera probablement appelé à peser.

Le jugement final est comme suit :

" TALBOT, being called upon to assign errors, as ordered to do by the Court, declares that he has no errors to assign.

LÉGARÉ, on behalf of our Sovereign Lady the Queen, moves that, inasmuch as the said plaintiff in error hath refused and neglected to assign his errors as he was required to do by the peremptory order given by the Court, on the eighteenth day of December, instant, he the said plaintiff in error be non-suited, and further that this Honorable Court do award execution.

Whereupon, all and singular the premises being considered, and it being understood by the Court of our Lady the Queen, now here, that no one cometh on the part of the said Pierre Duval dit Barbinas, to assign errors as ordered by this Court, and seeing the declaration made in open Court, on behalf of the said Pierre Duval dit Barbinas, that he will not assign errors : It is considered and adjudged by the said Court, now here, that there is no error, either in the record or proceedings, or in the giving of the judgment aforesaid.

Therefore, it is considered and adjudged, by this Court, that the judgment aforesaid be in all things affirmed and stand in full force and effect : and thereupon it is ordered that the keeper of the common gaol of this District do deliver up the said Pierre Duval dit Barbinas, to the custody of the Sheriff of the District of Arthabaska, to be by him detained until discharged in due course of law. *Dissentiente* the Honorable Mr. Justice MONDELET."

TALBOT et TOUSIGNANT, pour le demandeur en erreur.

LÉGARÉ, pour Notre Souveraine Dame la Reine.

CIRCUIT COURT.—MONTREAL.

Before :—LORANGER, Justice.

No. 1643. { ST. GEMMES DIT BEAUVAIS..... Appellant.
and
CHERRIER..... Respondent.

Held :—On appeal to the Circuit Court from a judgment rendered by justices of the peace under the agricultural act :

1o. That, in the case submitted, under the provisions of this act, the justices had no jurisdiction to decide upon the amount of damages suffered.

2o. That such damages must be determined by *experts* to whom alone the statute has given the required authority.

3o. That the Court on such appeal will take cognisance, *ex officio*, of the commission appointing justices of the peace, as shewing the place of residence of the justices who rendered the decision appealed from.

Jugé :—Sur appel à la Cour de Circuit d'un jugement rendu par des juges de paix en vertu de l'acte d'agriculture :

1o. Que, dans l'espèce, sous les dispositions de cet acte, les juges de paix n'avaient aucune juridiction pour décider sur le montant des dommages soufferts.

2o. Que tels dommages doivent être constatés par des experts auxquels seuls le statut a conféré l'autorité requise.

3o. Que la Cour sur tel appel prendra connaissance, *ex-officio*, de la commission nommant les juges de paix, comme constatant la résidence de ceux qui ont rendu le jugement dont était appel.

Judgment rendered the 30th. December, 1863.

LORANGER, Justice.—This is an appeal brought under the provisions of the Agricultural Act, (1) from a judgment rendered by two magistrates sitting at Laprairie. By the judgment the appellant was condemned to pay a penalty for cattle entering on the respondents farm, and also to pay certain damages.

The chief question raised at the argument was as to whether there is anything on the record to shew that the justices of the peace had jurisdiction, as being resident in the county where the offence was committed. (2) The plea states in general terms that it did not appear that the magistrates had jurisdiction, and that in fact they had none, but it does not state for what reason or ground they had not such jurisdiction. It is to be noticed that the case does not come up on a writ of *certiorari*, but on an appeal ; and I

(1) Cons. Stats. of L. C. chap. 26.

(2) Sect. 38, of the Act.

hold there is sufficient before me to shew that the magistrates had jurisdiction, and were residents in the county of Laprairie. The session of the magistrates was held "at Laprairie" where the defendant had his domicile and the offence was committed, and, in addition to this, the writ of appeal was addressed "to Ludger Ste. Marie et Alexis Moquin, Juges de Paix pour le district de Montréal, résidents au village de Laprairie." The commission of the peace, as enrolled in the office of the clerk of the peace, is produced here, by which it appears that these justices were residents of Laprairie at the date of the commission, in August, 1863.

The judgment being on the 6th. November, 1863, I can not assume that the justices had absented themselves from the county between these two dates, and had merely come back to decide the case. On the contrary, I am bound to take official cognizance of the commission of the justices of the peace to the same extent as, of the commission of a judge of this Court, or of the attorney general, all of which appear in the *Official Gazette*; if I do so, there can be no doubt, the magistrates had jurisdiction, and that objection must be overruled.

I am of opinion, however, that under the Statute the magistrates could not themselves decide upon the amount of damage, but were bound to name *experts* to report on the damage, and after such report the magistrates could award "to the complainant the amount of damages set forth in the report." (1) The words of the statute, are: "If the Justice has reason to believe that damage has been done, he shall forthwith order the parties contesting, unless they forthwith arrange the matter in dispute between them in his presence, each to name an *expert*, and the Justice himself shall appoint a third, and the two others also, if the parties refuse to name them; The *experts*, if so named, shall proceed

(1) Sec. 8, sub-sec. 3, 4.

as soon as possible to ascertain the damages....and they shall report in writing to the Justice of the Peace, the conclusions awarded by them in the matter.

The Justice of the Peace, after notifying the parties, and having heard them, if present, in favour of or against the report, *shall award to the complainant the amount of damages set forth in the report, with the costs, &c."*

I look upon this as imperative and as giving jurisdiction to the *experts* alone to decide on the damages. The justices have therefore exceeded their powers as to the damages, but have not done so as to the penalty.

It is for this Court to give the judgment which the Court below should have given, and as there cannot be two final judgments rendered in the same case, I will set aside the judgment and order that an *expertise* be had.

Judgment :—" Considérant qu'aux termes de la clause 8me du chapitre 26 du Stat. Ref. du Bas-Canada, il est pourvu à ce que, en matière semblable à la présente espèce, nulle partie ne puisse être condamnée à des dommages si, au préalable, une expertise n'a été ordonnée pour les constater par le ou les juges de paix, saisis du litige ; et que cette expertise préalable est aux termes et dans l'intention du statut tellement de rigueur qu'elle ne peut se suppléer par aucun autre mode d'instruction et d'enquête, et qu'un jugement condamnant à tels dommages ne peut avoir de valeur légale qu'en autant qu'il repose sur semblable expertise : Considérant que dans la présente espèce l'appelant a été condamné sans cette formalité essentielle à la validité de ce jugement, et que, partant, il est entaché d'erreur, et doit être cassé ; casse, annule et met au néant le dit jugement du 6 novembre, 1863, et remet les parties dans le même et semblable état qu'elles étaient immédiatement après la clôture de l'enquête, qui est cependant déclarée ouverte, pour les fins de l'expertise qui sera ordonnée. Et la Cour, rendant le jugement que les dit juges de paix

eussent dû rendre, ordonne, qu'en la forme voulue par la dite clause 8me, il sera par les dits juges de paix ordonné qu'une expertise aura lieu pour constater les dommages, si aucun dommages existent, pour être, sur la dite expertise, rendu tel jugement final que de droit, tant sur ce chef, que sur les autres chefs de la dite plainte &c. &c.

LANCROT, for appellant.

DOUTRE, D'Aoust & DOUTRE, for respondent.

CIRCUIT COURT.—MONTREAL.

Before :—LORANGER, Justice.

No. 1832. { PERRAULT Plaintiff.
vs.
LAURIN Defendant.

The plaintiff signed a composition deed between the defendant and his creditors, agreeing to receive 7s 6d in the pound, which were paid; and after signing the deed took a note from the defendant for a sum equal to 5s in the pound additional, upon which note the action was brought.

The defendant invoked the nullity of the note as fraudulent and void.

Held :—That the case of Greenshields and Plamondon must be taken as establishing the doctrine that a note so given was not void as being in fraud of creditors, or from any nullité d'ordre public.

Le demandeur signa un acte d'atténuation entre le défendeur et ses créanciers, consentant à recevoir 7s.6d. dans le louis, qui furent payés; après l'exécution de cet acte le demandeur obtint du défendeur un billet équivalant à 5s. dans le louis de plus, sur lequel billet l'action était portée.

Le défendeur invoqua la nullité de ce billet comme frauduleux et nul.

Jugé :—Que la cause de Greenshields et Plamondon doit être regardée comme établissant la doctrine qu'un billet ainsi donné n'est pas nul comme frauduleux envers les créanciers, ou en raison d'aucune nullité d'ordre public.

Judgment rendered the 30th December, 1863.

LORANGER, Justice; stated in effect that the action was brought to recover the amount of a promissory note made by the defendant, in favour of the plaintiff, payable twelve months after date. The plea alleged the nullity of the note, which was given subsequently to the passing of a notarial deed of composition between the defendant and his creditors, of the 5th. March, 1862. The composition

mentioned in the deed was for 7s 6d in the pound, and was secured by the indorsement of one Rolland, and for this composition the plaintiff had given a notarial discharge filed in the cause. The note sued upon was given to secure to the plaintiff a dividend equal to an additional 5s in the pound, making in all 12s. 6d. in the pound. It did not appear whether the other creditors were, or were not, aware of this note having been given. The question raised was as to whether the note was, or was not, void as being in fraud of the other creditors, and as being a *nullité d'ordre public*. The affirmative was held in this Court in the case of Greenshields and Plamondon, (1) and the action which was on a note given under similar circumstances, was dismissed. The note there was given before the composition, and in this case after it, but he did not see that this made any difference in principle. In appeal, however, this judgment was reversed, and judgment given upon the note. He looked upon the judgment in appeal as applicable to this case and he must follow it, although if he were acting as a legislator he would declare such notes null, as fraudulent, and as against commercial probity.

The defendant's counsel here stated that the judgment in appeal in Greenshields and Plamondon, was understood to rest, to some extent, on the repeated promises to pay, proved in that case, and upon special facts, also proved, rather than on the general principle now stated.

The learned judge referred to the case as reported, and to the opinion there expressed, that the nullity of such a note was merely relative, that the creditors might have raised the question as to its validity, but not the defendant himself. This appeared to him to decide that the note was a good note, as between the parties, and that it was not absolutely null and void as against public policy.

Judgment would be rendered for the plaintiff.

LORANGER and LORANGER, for plaintiff.

DENIS and TRUDEL, for defendant.

(1) 10 L. C. Rep., p. 251 :—2 L. C. Jurist, p. 240.

COUR DE CIRCUIT.—QUÉBEC.

Présent :—STUART, Juge.

No. 1926. { BOISSIÈRE..... Demandeur.
vs.
FAUCHER..... Défendeur.

Jugé :—1o. Que le grand constable n'est pas un recording officer, et n'est pas obligé d'avoir un bureau pour les devoirs de sa charge.

2o. Qu'une saisie ne peut être annulée parce qu'elle aurait été faite dans les limites du Palais de Justice, en dehors de l'audience.

3o. Que le cap. 85, sec. 3 sous-sec. 6 des Stat. Ref. du B. C., ne s'applique qu'aux outils des ouvriers nécessaires à l'exercice de leur métier.

Held :—1o. That the high constable is not a recording officer, and is not obliged to have an office for the execution of his duties.

2o. That a seizure will not be set aside because it has been made within the limits of the Court House, but without the hall of the Court.

3o. That the Con. Stat. L. C. cap. 85, sec. 3, sub-sec. 6, is only applicable to the tools of tradesmen necessary to the exercise of their calling.

Jugement rendu le 19 janvier, 1864.

Le demandeur ayant obtenu jugement contre le défendeur, grand constable pour le district de Québec, fit émaner une saisie exécution, et saisit en vertu d'icelle certains effets que le défendeur avait dans un bureau dans le Palais de Justice, à Québec.

Le défendeur fit opposition à cette saisie, et en demandait la nullité :

1o. Parce que la saisie avait été pratiquée dans un bureau public, savoir, dans le bureau de l'opposant, grand constable du district de Québec, 2o. parce que la saisie avait été faite dans les limites du Palais de Justice, et 3o. parce que les effets saisis, étant d'une valeur au-dessous de \$30.00, étaient exempts de saisie d'après la 3e sect. du cap. 85, des Stat. Ref. du Bas-Canada.

HAMEL, pour l'opposant :—L'on doit observer dans les saisies exécutions, comme dans les ajournements, les règles prescrites par l'ordonnance de 1667, et reproduites par les auteurs qui l'ont commentée, ainsi l'on ne peut faire un ajournement, ni dans une église, ou dans un auditoire

L'on ne saurait d'ailleurs établir un gardien dans un bureau public, ou tous doivent avoir accès en tout temps (1).

BOSSÉ, pour le demandeur :—L'opposant n'est pas tenu par sa charge d'avoir un bureau, qui n'est pas même nécessaire à l'exercice de ses fonctions (2).

Les arrêts cités par Jousse ne peuvent avoir aucune application à la présente espèce ; ils ne parlent en effets que d'ajournements fait dans une église ou dans un auditoire. Le motif qui les a dictés a été la crainte du scandale, et le respect dû au culte et à la justice. D'ailleurs, il faut appliquer ici le principe général que les biens du débiteur peuvent être saisis en quelque lieu qu'ils se trouvent, et il n'existe aucun texte de loi qui puisse y faire déroger en la présente cause. (3)

STUART, Justice.—There can be no doubt as to the decision of this case.

The high constable is not a recording officer, and his duties do not require that he should occupy or keep open a public office in the Court house. The government allow him to occupy a room in the Court house free of rent, it is no reason that he should on that account be entitled to all the rights, privileges and exemptions accorded to public officers, such as the prothonotary or the clerk of the Crown, whose duties might be compared with those of english recording officers. There are other reasons set forth in the opposition but they are not valid, the opposition must therefore be dismissed.

BOSSÉ et BOSSÉ, pour le demandeur.

TESSIER, ROSS et HAMEL, pour l'opposant.

(1) Jousse, Com. sur l'ord. de 1667, vol. 1, pp. 127 et 128 :—Idem vol. 2, p. 318.

(2) 1 Burn's Justice, p. 539.

(3) 7 Pothier, Procédure Civ., p. 175 :—Carré, Procéd. Civile, sur l'art. 68, Code de Procéd., et les citations qu'il y fait.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 457. { DEBIEN Plaintiff.
 vs.
 { MARSANT DIT LAPIERRE Defendant.

Held.—1o. That in an affidavit for *capias* the debt is sufficiently set forth by stating that the defendant is indebted to the plaintiff in the sum of £39, without stating the cause of debt, or the place where it was contracted.

2o. That the grounds of deponent's belief are sufficiently set forth by a statement in the affidavit to the effect that the defendant stated to deponent, at a time and place mentioned, that he was about to go to California, one of the United States of America, to make money, and asked the deponent to procure him money for the voyage, and by afterwards making the same statements to persons named in the affidavit.

Jugé :—1o. Que dans un affidavit pour *capias* la dette est suffisamment énoncée s'il est dit que le défendeur est endetté envers le demandeur en une somme de £39, sans indiquer la cause de la dette ou l'endroit où elle a été contractée.

2o. Que les raisons de croire du dépositant sont suffisamment énoncées par une allégation dans l'affidavit à l'effet que le défendeur avait dit au dépositant, dans un endroit et à une époque indiqués, qu'il était sur le point d'aller en Californie, un des États-Unis de l'Amérique, pour y faire de l'argent, et avait requis le dépositant de lui procurer de l'argent pour le voyage, et en répétant ces avances à d'autres personnes nommées dans l'affidavit.

Judgment rendered the 31st December, 1863.

In this case a writ of *capias* was sued out founded on the affidavit of the plaintiff: "Que le dit Antoine Marsant dit Lapierre, de la paroisse de Ste. Rose, cultivateur, est endetté envers le demandeur en une somme excédant quarante piastres, c'est-à-savoir, en une somme de trente livres, cours actuel," saying nothing more as to the debt.

The grounds of the plaintiff's belief were stated to be that on a day and at a place named, the defendant had said: "Qu'il, le dit Marsant, allait partir pour la Californie, c'est-à-dire, un des États-Unis de l'Amérique, pour gagner de l'argent, et qu'il, le dit Marsant, lui a même demandé de lui procurer de l'argent pour payer son passage." And that he, the defendant, had afterwards repeated this to several persons named.

The defendant moved to quash the *capias* for the following among other reasons.

1st. Because it was not mentioned, in the affidavit, where the debt was contracted, so as to shew that the Court had jurisdiction.

2o. Because the nature and cause of the debt was not disclosed.

3o. Because the reasons given were insufficient to sustain the *capias*.

SMITH, Justice.—Referred to the above grounds, and held, that it was sufficient under the law of arrest as it now stands, to swear that the defendant was personally indebted in a sum exceeding ten pounds, currency. As to the place where the debt was created, the defendant must make that a ground of petition for his discharge. He held the grounds given in support of the plaintiff's belief sufficient, and the motion could not be granted.

MORIN, OUMET and CHAPELEAU, for plaintiffs.

LORANGER and LORANGER, for defendant.

SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 1062.	{	ANDERSON Plaintiff.
		vs.
		THE QUEBEC NORTH SHORE TURN- PIKE ROAD TRUSTEES..... Defendants.
		and THE QUEBEC BANK..... Garnishee.

Held :—That the Quebec North Shore Turnpike Road Trustees, are the agents of the Crown, and that moveable or immoveable property held by them belongs to and is vested in the Crown.

Jugé :—Que les Syndics des Chemins à barrières de la Rive du Nord, sont les agents de la Couronne, et que les meubles ou immeubles possédés par eux appartiennent à et sont la propriété de la Couronne.

Judgment rendered the 14th October, 1863.

By a judgment of the Court rendered on the 3rd of May, 1862, the plaintiff recovered judgment against the Turn-

pike Trust, the defendants, for the sum of £1750.0.0, and costs, and on the 14th of June, following, the usual *saisie-arrest*, or execution, issued after judgment at the instance of the plaintiff, to attach by seizure and arrest in the hands of the Quebec Bank, all and every the sums of money and other things whatsoever which the Quebec Bank might then or thereafter owe to the Quebec North Shore Turnpike Road Trustees, the defendants, and commanding the defendants and the garnishee to appear and show cause, if any they had, why the attachment made in virtue of the writ of *saisie-arrest* should not be declared good and valid ; on the return of the writ, the Cashier of the Quebec Bank appeared, and declared that at the time of the service of the writ, the Quebec Bank was indebted to the defendants, in the sum of \$5886.74.

The defendants contested this declaration, alleging that the money which the Quebec Bank had declared to be due the defendants, was deposited by them in the Quebec Bank, in their quality of Trustees, but belonged to Her Majesty the Queen for the public uses of the Province ; that by two separate ordinances of the Legislature passed respectively in the fourth and twentieth years of Her Majesty's Reign, the defendants were authorized to acquire property and estate moveable and immoveable, which, being so acquired, should be vested in Her Majesty for the public uses of the Province. That the sum of money declared to be due by the Quebec Bank, having been acquired by the defendants, was vested in Her Majesty, and was not liable to attachment. The plaintiff demurred to this contestation :
 " Because the contestation rests on the right of the Crown to
 " the monies admitted to be due by the Bank, and not on
 " any right in the party contesting : Because the contesta-
 " tion shows no interest in the contesting party to have the
 " same maintained : Because the contestation is based
 " wholly on a *droit d'autrui* : Because the issue raised by
 " the contestation could only legally be raised by the
 " Crown."

TASCHEREAU, Juge :—Le demandeur poursuit les défendeurs, obtint jugement et procéda par voie de saisie-arrêt entre les mains de la Banque de Québec. La Banque de Québec a comparu et a déclaré avoir une somme de \$5386.74, appartenant aux défendeurs. Les défendeurs ont contesté cette déclaration alléguant que l'argent appartenait à Sa Majesté. Le demandeur a répondu à cette contestation par une défense au fond en droit, que les défendeurs n'avaient pas d'intérêt à contester, et qu'en contestant ils excipaient du droit de Sa Majesté. Je crois que la position du demandeur est insoutenable. Les défendeurs ont toute intérêt à montrer que l'argent ne leur appartient pas ; si l'on regarde leur Acte d'Incorporation, 4 Vic., Cap. 17, l'on verra que les défendeurs ne sont que les agents, les fidéicommissaires de Sa Majesté. Les défendeurs n'excipent pas du droit d'autrui ; ils ne peuvent avoir d'autre argent que ce qui appartient à Sa Majesté ; leur Acte d'Incorporation le dit en termes directes, et ils ont tout intérêt à empêcher que ces argents soient dépensés d'une manière contraire à la disposition de la loi.

Jugement : Considérant que les défendeurs ont non seulement un intérêt, mais même sont sous une obligation impérieuse en vertu de leur office, de voir à ce que les deniers saisis et arrêtés en cette cause, ne le soient que d'une manière légale, et leur paiement effectué aussi conformément à la loi ; Considérant que par la loi, tous les biens meubles et immeubles en la possession des défendeurs sont la propriété de Sa Majesté, et que comme tels les dits biens ne pouvaient être saisis et arrêtés en la manière et forme suivies en cette cause, et, qu'en autant, les défendeurs, sans exciper des droits d'autrui, peuvent légalement contester la déclaration des tiers-saisis, et par leur contestation indiquer que les deniers déclarés par les tiers-saisis, sont la propriété de Sa Majesté, et ne pouvaient être saisis en cette cause. La Cour renvoie la défense au fond en droit du

demandeur à la contestation faite par les défendeurs de la déclaration des tiers-saisis.

ALLEYN and ALLEYN, for plaintiff.

STUART and MURPHY, for defendants.

COUR DE CIRCUIT.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 2416 { LES COMMISSAIRES D'ÉCOLES, pour
la municipalité scolaire de St.
Roch de Québec Nord..... *Demandeurs.*
vs.
ROUSSEAU *Défendeur.*

Juge : — Que le rôle des évaluations d'une municipalité doit être déposé pour révision dans les limites de la municipalité qu'il affecte.

Held :—That the valuation roll of a municipality must be deposited for revision within the limits of the municipality to which it refers.

Jugement rendu le 25 novembre, 1863.

Les demandeurs réclamaient du défendeur, comme propriétaire dans leur municipalité scolaire, la somme de £20 12 3, portée contre lui au rôle d'évaluation fait et assermenté le 17 juin, 1863.

La cotisation était imposée à raison de quatre sous dans le louis sur la valeur de la propriété du défendeur, estimée à £2475. Les demandeurs alléguaient qu'une résolution en conseil du 21 août, 1863, les autorisait à réclamer en justice les sommes dues aux commissaires en vertu du rôle d'évaluation mentionné ci-haut. Le défendeur répondit par une défense au fond en fait et une défense au fond en droit à cette action. " Que les demandeurs n'avaient point une existence légale ; qu'ils ne pouvaient pas ester en jugement sous les qualités et les noms pris au bref ; que la cotisation ou répartition de quatre sous dans le louis sur la valeur des immeubles situées dans la dite municipalité scolaire était

excessive, illégale et excédait le taux autorisé par la loi ; et que la cotisation ou répartition avait été illégalement et irrégulièrement faite.

Il résultait des faits prouvés en cette cause que le rôle d'évaluation avait été déposé pour révision en dehors des limites de la municipalité.

Bossé, pour les demandeurs. Il n'y a et ne peut y avoir de nullités que celles prononcées par la loi, en cette matière l'on ne peut raisonner par analogie ni *ab inconvenienti*, et si le statut ne prononce pas la nullité, ce qu'il est loin de faire, le juge ne peut la prononcer non plus, et s'il le faisait, il dépasserait ses pouvoirs.

TASCHEREAU, Juge. — Quoiqu'il n'y ait pas de clause expresse du statut des municipalités ordonnant le dépôt du rôle d'évaluation dans les limites de la municipalité pour laquelle il a été fait, cette obligation ressort néanmoins des clauses qui ordonnent le dépôt du rôle. Le but de cette disposition a dû être de faciliter l'examen du rôle à tous les intéressés, et de leur permettre les réclamations qu'ils pourraient avoir à faire, et ce but serait entièrement manqué si le rôle pouvait être déposé en dehors des limites de la municipalité, et partant dans un endroit où il pourrait être inaccessible aux intéressés.

Jugement :—Action renvoyée, sauf à se pourvoir.

Bossé et Bossé, pour les demandeurs.

CASALT, LANGLOIS et ANGERS, pour le défendeur.

SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 80. { THE QUEBEC BANK..... *Plaintiff.*
 vs.
 { ROLLAND, *et al.*, *Defendants.*

Held :—That a motion to reject an articulation of facts, must be presented at *enquête*.

Jugé :—Qu'une motion pour rejeter une articulation de faits, doit être présentée à l'enquête.

Judgment rendered the 4th April, 1863.

On the 1st April, 1863, the defendants by their attorney moved that the interrogatories numbers three, four and five of the plaintiff's articulation of facts, be declared irrelevant to the issue raised in the cause.

TASCHEREAU, Justice :—This is a motion to reject certain parts of the plaintiff's articulation of facts. Upon consultation with Judge Stuart, we have come to the conclusion that all such motions ought to be presented at *enquête*.

Judgment :—Take nothing by motion.

HOLT and IRVINE, for plaintiff.

CASALT, LANGLOIS and ANGERS, for defendants.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 2359. { DILLON..... Plaintiff.
 vs.
 { HARRISON, et al..... Defendants.

Held.—That under the 14th and 15th sections of the Con. Stat. of L. C. Cap. 82, a defendant sued personally, and as authorising his wife, who was also a defendant, may be examined as a witness on behalf of the plaintiff.

Jugé :—Que sous les dispositions des 14^{me} et 15^{me} secs. du Stat. Ref. du B. C., cap. 82, un défendeur poursuivi personnellement, et comme autorisant sa femme, défenderesse à l'action avec lui, peut être examiné comme témoin de la part du demandeur.

Judgment rendered the 31st. December, 1863.

This action was brought against Eliza Harrison, formerly widow of William M. Browne, and now wife of Harry Seymour, separated from him as to property, and also against the said husband, personally, and as authorizing his wife ; and against E. A. B. Browne wife of George J. E. Carter, separated as to property from her husband by marriage contract, and against Carter, as authorising his wife, and as curator *ad hoc* duly appointed to his wife, and also personally. The female defendants pleaded separately ; the husbands were foreclosed from pleading. The inscription for *enquête* was general. At *enquête* Carter was brought up as a witness on behalf of the plaintiff, and was asked whether an exhibit filed was signed by him as attorney for this wife. An objection was made to his examination on the ground that Mrs. Carter was a defendant in the cause, and that a husband could not be examined for or against his wife, and because, in a non commercial matter, a power of attorney could not be proved by parol evidence. The objection as to the incompetency of the husband as a witness was maintained, and a motion was made to revise the ruling.

SMITH, Justice.—Held that the clauses of the statute (1) did not allow a husband or a wife to be called or examined as a witness for or against each other, when one of them was a party to a suit ; but that where they were both parties, each could be examined for the opposite party.

Ruling at *enquête* reversed.

PARKIN, for plaintiff.

GIROUARD, for defendant.

COUR DE CIRCUIT.—MONTREAL.

Présent :—BERTHELOT, Juge.

No. 4234.	{	AUBRY, <i>et ux.</i>	Demandeurs.
		vs.	
		DENIS, <i>et al.</i> ,.....	Défendeurs.

Jugé :—Qu'une société formée pour l'usage et exploitation privée d'un moulin à battre, est dissoute par la mort d'un des associés, et que les représentants du défunt ont droit d'en demander la vente, ou que les autres associés leur paient la valeur de la part qu'y avait l'associé décédé.

Held :—That a copartnership formed for the working of a threshing mill among the copartners, is dissolved by the death of one of them, and that the representatives of the deceased partner have a right to require that the mill be sold, or that the other partners pay them the value of the deceased partner's share.

Jugement rendu le 31 décembre, 1863.

La demande portée devant la Cour de Circuit avait pour but le recouvrement d'un tiers de la valeur d'un mou-

(1) In *Ogilvie vs. Anderson* which was an action *en séparation de corps et de biens*, still pending, the defendant, the husband, summoned the wife to examine her. The plaintiff's counsel objected, but the Court [Smith J.] decided she could be examined.

Consol. Stat. of L. C. cap. 82, secs. 14 and 15 :

Section 14.—“ All the relations and connections of the parties, except husband and wife, may be witnesses in civil matters, to depose in favor of or against them, notwithstanding the eleventh article of the twenty second title, *enquête*, of the ordinance of 1667, which is hereby expressly repealed, inasmuch as it regards degrees of relationship only ;” &c.

Section 15.—“ Any party in a cause may be summoned and examined as a witness by any other party in the same cause, and the party so summoned and examined, may be cross-examined as a witness by his own attorney, if he be so represented ; and the evidence given by any such party may be made available to the party obtaining it, or not, as he thinks proper, provided he declares his intention, at the close of his *enquête*, to avail himself of such evidence or not ; but no such evidence shall be turned to the advantage of the party giving it.”

lin à battre, dont les parties en la cause étaient propriétaires, chacune pour un tiers indivis, et qui avait été acquis en société avec les défendeurs, par feu Théophile Denis, premier mari de la demanderesse, Angèle Legault dite Deslauriers, et commun en biens avec elle.

Après le décès du dit Théophile Denis, il fut procédé (Labadie, Notaire,) à l'inventaire des biens de la communauté qui avait existé entre sa veuve et lui, et ensuite à la vente de tous les biens meublés de la dite communauté, au nombre desquels était le tiers indivis du dit moulin, qui fut adjugé à la demanderesse, au prix de £15, le moulin ayant été estimé à une valeur de £45.

Depuis cette vente, le moulin ayant toujours été en la possession des défendeurs, les demandeurs, savoir la dite Angèle Legault dite Deslauriers, et Aubry, son second mari, se plaignirent qu'ils ne pouvaient jouir commodément de leur tiers et demandèrent la cessation de l'indivis.

Ils concluaient à ce que les défendeurs fussent condamnés conjointement et solidairement à leur payer £15, pour leur tenir lieu du dit tiers indivis ; " si mieux n'aiment toutefois les défendeurs, dans le délai qui sera fixé par cette Cour, procéder ou faire procéder à la vente du dit moulin par encan public, à être faite après avis public à être donné à la porte de l'église de la Pointe-Claire, après l'issue du service divin du matin, pendant au moins un dimanche, la dite vente à être faite aux lieu, jour et heure qui seront indiqués par le dit avis public ; pour du produit de la dite vente un tiers être payé aux dits demandeurs, pour leur tenir lieu du dit tiers dans le dit moulin, ou à moins que les défendeurs ne se conforment à tous autres ordres qui pourront être donnés par cette Cour, suivant qu'elle jugera convenable. "

Les défendeurs plaidèrent :

1o. Que la société contractée entre eux et feu Théophile Denis, par l'achat en commun du moulin devait durer aussi longtemps que durerait le moulin.

20. Que s'il y avait quelque circonstance qui eût pu amener la dissolution de société, ce n'a pu être que le décès de Théophile Denis, mais que la demanderesse avait renoncé à cette dissolution, et avait voulu que la société fût continuée en vendant à l'enchère publique, le tiers du dit moulin, au lieu de demander la vente du moulin entier.

30. Que la demanderesse voulait si peu la dissolution de la société qu'elle s'était portée adjudicataire du dit moulin, ce que rien ne l'obligeait de faire ; qu'ayant acheté volontairement cette part, elle se trouvait absolument dans la même position, que si elle eût originairement acheté le dit moulin, conjointement avec les défendeurs.

40. Qu'une vente à l'encan du dit moulin, leur causerait des dommages ; d'un autre côté, le tiers qu'ils avaient chacun du dit moulin, suffisait à leur besoin, et ils pouvaient se passer du tiers appartenant à la demanderesse.

50. Que la demanderesse, si elle ne pouvait tirer partie de son tiers, pouvait bien le vendre comme elle l'avait déjà fait.

60. Que les demandeurs par leur action, voulaient forcer les défendeurs à acheter une part de moulin, dont ils n'avaient pas besoin, ou à vendre deux parts dont ils avaient besoin ; que l'une ou l'autre de ces alternatives, était manifestement injuste, et que la demande était vexatoire.

Ci-suit le jugement :

La Cour &c.—Considérant que la société qui a existé entre les défendeurs et feu Théophile Denis, pour l'usage et l'exploitation du moulin à battre, mentionné en la déclaration, qui leur appartenait en propriété, a cessé au jour du décès du dit Théophile Denis, et que la part indivise qui lui appartenait pour un tiers dans le dit moulin, a été vendue à Angèle Legault dite Deslauriers, sa veuve, la demanderesse, lors de la vente du mobilier de la communauté qui

avait existé entre elle et le dit Théophile Denis, le 9 juillet, 1860, et que par le mariage des dits demandeurs, ces derniers sont maîtres de cette part indivise sans aucune restriction à raison de la société qui existait entre les dits défendeurs et le dit feu Théophile Denis, et qu'à raison de ce que dessus, les dits demandeurs ont le droit de toucher et recevoir le prix de leur tiers indivis dans le dit moulin, dont la valeur a été admise à £30, et dont les dits défendeurs sont en possession, et dont ils ont toujours joui depuis le décès du dit Théophile Denis, a condamné et condamne les dits défendeurs, à payer aux dits demandeurs, la somme de £10, pour leur tenir lieu du prix et valeur du tiers du dit moulin, et aux dépens de l'action et de la contestation ; si mieux n'aiment les dits défendeurs, sous huit jours de la signification de ce jugement, procéder avec les demandeurs à la vente du dit moulin, par encan public, vingt-quatre heures après avis donné à la porte de l'église de la paroisse de la Pointe-Claire, après le service divin du matin, un jour de dimanche, et qu'au refus des défendeurs de ce faire, il y soit procédé par et sous l'autorité de cette Cour, ainsi qu'il pourra ci-après être ordonné, par la saisie du dit moulin, ou autrement ; pour du produit de la dite vente, dans l'un ou l'autre cas, un tiers être payé aux dits demandeurs, et les deux autres tiers aux dits défendeurs. Les frais de la dite vente devant être partagés et divisés entre les demandeurs d'une part, et les dits deux défendeurs chacun pour un tiers.

Et quant aux frais de cette action et de la contestation d'icelle, les dits défendeurs y sont condamnés.

BÉLANGER et DESNOYERS, pour les demandeurs.

DENIS et TRUDEL, pour les défendeurs.

SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 2084. { THE QUEBEC BANK..... *Plaintiffs.*
 vs.
 STUART, et al..... *Defendants.*
 and
 THE QUEBEC FIRE ASSURANCE
 COMPANY..... *Garnishees.*

Held :—That, when a plaintiff, who has obtained judgment against a garnishee, neglects or refuses to enforce payment from the garnishee, the defendant will be empowered to cause the issuing of a writ of execution for the levying of the amount due by the garnishee, which amount will be held by the sheriff subject to the order of the plaintiff.

Jugé :—Que lorsqu'un demandeur, qui a obtenu jugement contre un tiers-saisi, néglige ou refuse de contraindre le tiers-saisi à payer, le défendeur sera autorisé à poursuivre l'émission d'un writ d'exécution pour prélever le montant dû par tel tiers-saisi, lequel montant restera entre les mains du shérif sujet à l'ordre du demandeur.

Judgment rendered the 5th December, 1863.

The plaintiffs, in September, 1863, recovered judgment against the garnishees for £62 10s, to be paid them in discharge, *pro tanto*, of William Henderson, one of the defendants, but failed to execute or take advantage of their judgment in any way, and did not insist upon or enforce payment.

The defendants then moved: "That inasmuch as the plaintiffs in this cause have obtained judgment against the garnishees, by which they have been condemned to pay to the plaintiffs, in discharge of Henderson, £62 10s, and the plaintiffs have since the rendering of the said judgment refused and neglected to enforce from the garnishees payment of the said sum of money, the said defendant, Henderson, be permitted to cause to be issued out of this Court a writ of execution to compel the garnishees to pay the said sum of money to the plaintiffs, in discharge of him, the said Henderson, unless the said plaintiffs do themselves, within such short delay as the Court may appoint, cause such writ to be issued in the usual course."

TASCHEREAU, Juge :—Je ne puis trouver aucun précédent pour le jugement que je vais rendre sur cette motion, mais ce jugement, qui est fondé sur l'équité, formera lui-même un précédent.

Judgment :—The Court, etc. doth make the said rule absolute, with costs against the plaintiffs; and it is ordered that they, the plaintiffs, do within fifteen days from the service upon them of the present judgment, by writ of execution to be in due course sued out, proceed to execute the judgment aforesaid of the fifth day of september last, and in default of their so doing, and the said delay expired, it is considered and adjudged that the said Henderson may, and he is hereby empowered to, sue out in the name of the plaintiffs, such writ of execution as may be required for the purpose of executing the judgment aforesaid, and enforcing payment thereof; the proceeds levied under any such writ to be held by the sheriff for and on account of the said plaintiffs, and subject to their order.

STUART, G. O., for plaintiffs.

HOLT and IRVINE, for defendant.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 1404. { CHAPMAN, *et al* *Plaintiffs.*
 vs.
 NIMMO *Defendant.*
 and
 THE PHOENIX ASSURANCE Co., *Tiers-Saisie.*

Held :—10. On a special answer in law, that a portion of a plea to an action commenced by *seize-arre*, on notes not matured, by which the defendant denied the *disfigurement* and sequestration of effects set up in the affidavit for attachment, and alleged that he had continued to take up the notes as they became due, and that the action was vexatious and unfounded, and prayed that the affidavit be declared to be unwarranted, and that the attachment be set aside, will be dismissed as irregularly pleaded.

20. That these matters should be pleaded by preliminary exception as *nullité d'exploit*, and not by a plea to the merits.

So. That an answer in law, or demurrer, to a portion of a plea will be maintained as being consistent with the practice of the Court, although in the opinion of the Judge, the proper course was to move for the rejection or the objectionable parts of the plea.

Jugé :—1o. Sur une réponse spéciale en droit, que partie d'un plaideoyer à une action commoencée par une saisie-arrest, sur billet promissiroire non encore dû, par lequel le défendeur nait la déconiture, et le recèlement de ses effets allégués dans l'affidavit, et alléguait qu'il avait continué à retirer ses billets à leur échéance, et que l'action était vaxatoire, et concluant à ce que l'affidavit fut déclaré non fondé et la saisie mise de côté, sera renvoyée comme irrégulièrement plaideée.

20. Que ces matières devaient être plaidées par une exception préliminaire comme nullités d'exploit, et non par un plaidoyer au mérite.

30. Qu'une défense au fonds en droit, ou *demurrer*, à partie d'un plaidoyer sera maintenant en autant que cette pratique avait été suivie par la Cour, quoique dans l'opinion du Juge, une motion eût dû être faite pour rejeter la partie du plaidoyer qui était illégale.

Judgment rendered 31st December, 1863.

The judgment rendered in this cause on the 31st December 1860, on the exception *à la forme*, and exception *déclinatoire*, will be found reported in the 11 L. C. Reports p. 90.

The defendant by his first plea to the merits alleged, in effect, that at the date of the issuing of the writ of *saisie-arrest* the plaintiffs had no cause of action against him; that the notes upon which the action was brought, had not then become due, and were not then held by the plaintiffs; and denied the alleged *déconfiture* and secretion of his estate set up in the affidavit, and set up that the defendant had continued to retire the notes as they became due, and that

the action was tortious and vexatious: Conclusion that the affidavit be declared unjustified and unwarranted, and that the attachment be set aside, and the plaintiffs' action dismissed.

The plaintiffs filed an "answer in law" to that part of the pleas and of the conclusions whereby the defendant prayed that it be declared that the affidavit was unjustifiable and unwarranted, and that the attachment be set aside, on the following grounds:

"That the said defendant, cannot, by law, impeach the said writ or the issue thereof, or the affidavit made as the basis of the issue thereof, for the reasons mentioned in the said plea, otherwise than by a preliminary plea or *exception à la forme*, as by the parts of the said plea he has attempted to do, the same being grounds in the nature of *nullités d'exploit* and not in any way matters of defence upon the merits of the plaintiffs' action." Conclusion that the said portions of the said plea be rejected with costs.

The plaintiffs' *second* plea was to the same effect; and to that plea a similar answer was filed, and the case was inscribed for hearing on the *issues of law raised*.

SMITH, Justice:—Held that the attachment and affidavit had nothing to do with the merits of the action, and should not have been mixed up with the merits. It was impossible to plead to a seizure. It had been stated that an expression of opinion was given by certain of the Judges in appeal in the case of *Molson's Bank and Leslie*, (1) to the effect that on a plea to the *merits*, objection might be taken to the allegations of the affidavit, but he could not find that anything definite had been decided on that head, which ought to guide the Court. He had always held that portions of a plea irregularly pleaded could only be struck out, or got rid of, on motion, and not by demurrer or answer in law, but his opinion had not been followed by the other

[1] 12 L. C. Rep., p. 265.

Judges. In this case, therefore, he would adopt the opinion of the other members of the Court, because the practice had been adopted, wrongly as he still thought ; and the answer in law would be maintained.

ABBOTT and DORMAN, for plaintiffs.

MACRAE, for defendant.

CIRCUIT COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 83.	{	MAGUIRE.....	Plaintiff.
			vs.
		STRIDE.....	Defendant.
			and
	{	STRIDE.....	Opposant.

Held :—1o. That the *requête civile* is a proceeding still in force in Lower Canada.

2o. That reasons which could be urged against an action or opposition by an exception to the form, may be opposed to a *requête civile* by a simple motion to set aside.

3o. That the permission of the Court is necessary for the production of a *requête civile*.

4o. That service of the *requête civile* must be made upon the party interested in contesting it.

Jugé :—1o. Que la *requête civile* est une procédure encore en force dans le Bas-Canada.

2o. Que des moyens qui pourraient être opposés à une action ou à une opposition par une exception à la forme, peuvent être opposés à une *requête civile* au moyen d'une simple motion.

3o. Que la permission de la Cour est nécessaire pour la production d'une *requête civile*.

4o. Que signification d'une *requête civile* doit être faite à la partie qui a un intérêt à la contester.

Judgment rendered the 21st January, 1864.

This was an action in ejectment on which the plaintiff obtained judgment by default. Execution having issued, the defendant served upon the bailiff holding the writ an opposition *afin d'annuller* in the nature of a *requête civile*, alleging a settlement before entry, and that nevertheless the plaintiff had proceeded with the case and obtained a judgment by surprise. On the return of this opposition the

plaintiff moved to dismiss it for want of form upon several grounds, upon two of which the Court founded its judgment.

TASCHEREAU, Juge.— La question soulevée dans cette cause sur une motion pour faire mettre de côté une opposition, est de savoir si la requête civile est encore en force dans ce pays, ou si elle est tombée en désuétude.

Le défendeur prétend que malgré l'accord qui a eu lieu entre les parties, le demandeur a obtenu son jugement, et il produit maintenant son opposition afin d'annuler ; cette opposition est de la nature d'une requête civile.

Nulle doute que la requête civile a été en force dans ce pays. On le voit par le titre 35 de l'ordonnance de 1667, qui traite des requêtes civiles, et l'on ne trouve aucune loi qui abroge cette procédure. C'est l'opinion généralement reçue que la requête civile est encore en force dans notre système.

Maintenant voyons si l'opposant a observé les formalités requises pour réussir dans une telle procédure. Le demandeur prétend que non, et a fait motion pour la faire mettre de côté. J'ai eu des doutes si les chefs présentés dans cette motion n'auraient pas dû être présentés par un plaidoyer à l'opposition, mais je suis d'opinion que la requête civile, n'étant pas une procédure nouvelle, ni entièrement séparée de la cause originale, mais plutôt une procédure appartenant et faisant suite au jugement, peut-être contestée, et les chefs de contestations peuvent être attaqués par une motion telle que la présente. La motion étant admise, les deux premiers moyens sont suffisants pour en faire accorder la demande, et pour faire mettre de côté l'opposition. La première objection est que l'opposant " n'a pas obtenu " la permission de la Cour pour produire sa Requête. " Le titre 35 de l'ordonnance de 1667 prescrit les formalités nécessaires à être suivies. La requête civile se présente toujours devant le juge même qui a rendu le jugement contre lequel l'on réclame, c'est une manière polie de lui demander de

considérer de nouveau le jugement qu'il a rendu, et il est nécessaire de demander la permission de prendre de telles procédures.

Le deuxième chef de la motion du demandeur " que la requête civile devrait être signifiée ou à la partie intéressée ou au moins à son procureur, " est aussi très raisonnable, et je décide formellement sur ces deux points : premièrement, que l'on doit obtenir la permission du Juge pour produire une requête civile, et deuxièmement, que l'on doit signifier cette requête civile à la partie intéressée.

Judgment.—Opposition dismissed, with costs.

LANGLOIS and POZER, for plaintiff.

ANDREWS and ANDREWS, for opposant.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 2604. { BEAUDRY, Plaintiff.
vs.
OUIMET *et al.*, Defendants.

Held :—That the declaration of a party to a suit, that he intends to make use of the deposition of the adverse party examined as a witness in the case, will be rejected on motion, if it appears by affidavit, that although dated and filed as if during the *enquête*, it was, nevertheless, made and filed after *enquête* closed.

Jugé :—Que la déclaration d'une partie à un procès, qu'elle entend se servir de la déposition de la partie adverse, examinée comme témoin dans la cause, sera rejetée sur motion, s'il appert par affidavit, que quoique datée et produite comme à l'enquête, cette déclaration, néanmoins, avait été faite après l'enquête close.

Judgment rendered the 31st December, 1863.

SMITH, Justice : In this case the defendants move to reject from the record, as irregularly filed, a declaration made by the plaintiff that he intended to make use of the evidence given by the defendants when examined as witnesses in the case. It appears from the affidavits filed in support

of the motion, that this declaration was only received at the *greffe* on the 25th November, 1863, but was dated the 6th April, 1863, and was entered in the plunitiff as of that day, on the supposition that the defendants made no objection.

The time within which the declaration in question must be filed is fixed by the statute. (1) If the affidavits can be looked at, the paper must be held as irregularly filed. Could these affidavits be considered? Or, as contended by the plaintiff, must there be an *inscription de faux*? I am of opinion that an *inscription de faux* is not necessary in a case like this, and the motion to reject the paper must be granted.

ROY, for plaintiff.

CHAPELEAU, for defendant.

COUR DE CIRCUIT.—QUÉBEC.

Présent :—TASCHEREAU, Juge.

No. 892.	{	AMIOT dit LARPINIÈRE.....	<i>Demandeur.</i>
		VS.	
		BAILEY.....	<i>Défendeur.</i>

Jugé :—Que le tarif réglant la rémunération des charretiers dans la Cité de Québec, n'a aucune force en dehors des limites de la Cité.

Held :—That the tariff regulating the charges of carters for hire in the City of Quebec, is not in force outside of the City limits.

Jugement rendu le 24 décembre, 1863.

Le demandeur, qui était un des charretiers de la ville de Québec, poursuivait le défendeur pour 10 chelings, pour "carriage hire and drive."

(1) *Consol. Stat. of L. C. Cap. 82, sec. 15.*

Le défendeur plaida offres réelles d'une piastre avant l'institution de l'action, et que les services du demandeur ne valaient pas plus qu'une piastre, au taux du tarif fait par la corporation de Québec, relativement aux charretiers.

De la part du demandeur il fut prouvé par plusieurs charretiers que le demandeur avait été occupé par le défendeur pendant une heure ou une heure et demie, et que ses services valaient au moins deux piastres. Le défendeur produisit le tarif des charretiers fait par la corporation de Québec, et prétendit que le demandeur ne pouvait avoir un plus haut prix pour ses services que celui alloué par le tarif.

TASCHEREAU, Juge.—Le prix offert par le défendeur serait dans mon opinion, suffisant, mais il n'a pas jugé à propos d'examiner aucun témoin pour contredire les témoins du demandeur, qui en grand nombre ont prouvé la valeur de la réclamation du demandeur à dix chelins, il s'est appuyé seulement sur le tarif des charretiers pour la Cité de Québec, et je suis obligé de décider que ce tarif n'a pas de force hors des limites de la Cité.

Jugement, pour le demandeur.

PLAMONDON et GUILBAULT, pour le demandeur.

JOLICŒUR, pour le défendeur.

COUR SUPÉRIEURE.—MONTREAL

Présent :—BERTHELOT, Juge.

No. 2214. { DAVID..... Demanderesse.
 vs.
 GAGNON..... Défendeur.
 et
 LA COMPAGNIE DE DÉPOT ET DE
 PRÊT DU HAUT CANADA..... Intervenante.

Jugé :—1o. Que l'ameublement général stipulé par les père et mère de la mineure, en un contrat de mariage, est valable ;

2o. Que tout ce qui échoit à la femme de la succession de ses père et mère, et tout ce qui est donné par eux pour être conquis de la communauté, est entièrement à la disposition du mari, qui peut le vendre ou l'hypothéquer légalement ;

3o. Que sur dissolution de la communauté, et en vertu d'une stipulation de reprise d'apport, la femme ne peut reprendre ce qui a pu lui advenir de ses père et mère par succession ou donation, qu'à la charge des hypothèques que le mari y a imposées comme chef de la communauté.

Held :—1o. That the *ameublement général* stipulated by the father and mother of their minor daughter, in a contract of marriage, is valid.

2o. That every thing inherited by the wife from her father and mother, and all by them given to be *conquis* of the community, is entirely subject to the disposal of the husband, who may legally sell or hypothecate it.

3o. That upon dissolution of the community, and in virtue of a covenant of *reprise d'apport*, the wife is not entitled to claim that which she has got from her father and mother by inheritance or gift, except subject to the mortgages which the husband may have created thereon, as the head of the community.

Jugement rendu le 31 décembre, 1863.

BERTHELOT, Juge :—Lors du contrat de mariage de la demanderesse avec le défendeur elle était mineure, et les conventions en furent faites pour elle par ses père et mère, François David et Marie Joseph Dagenois, autorisée de son mari, stipulant pour leur fille mineure.

Il y eût d'abord convention de communauté suivant la coutume : puis, stipulation d'ameublement *général* dans les termes suivants ;

“ Se prennent les futurs époux avec les biens et droits à eux appartenant et tels qu'ils pourront leur échoir à l'avenir ; lesquels biens et droits de part et d'autre, tant meubles qu'immeubles, entreront en leur dite communauté, comme conquêts d'icelle, ameublissant à cet effet,

“ du *gré et consentement* de leurs dits parents et amis généralement, tous leurs dits immeubles, propres et acquêts, *présents et futurs*, et renonçant, pour ce regard seulement, à la coutume de Paris. ”

Ensuite, une clause de reprise dans les termes suivants :—
 “ Lors de la dissolution de la dite communauté, sera permis à la future épouse de l'accepter ou d'y renoncer, et, dans le cas de renonciation, de reprendre franchement et quittement tout ce qu'elle justifiera avoir *apporté* au dit mariage, et tout ce qui pendant icelui lui sera *advenu* et échu tant par succession, donation, legs ou autrement, ensemble ses donaire et préciput, tels que dessus stipulés, sans être tenue des dettes de la communauté, encore qu'elle y eût parlé, dont au dit cas elle sera *garantie et indemnisée* par et sur les biens du futur époux, sur lesquels elle aura *hypothèque à compter du dit jour*. ”

Tels sont les termes des deux clauses qu'il s'agit de concilier, dans le cas de dissolution de communauté par séparation de biens, suivie de la renonciation de la demanderesse.

Elles sont, l'une et l'autre, chacune dans son espèce, conçues et énoncées dans des termes aussi formels qu'on puisse les supposer.

Le contrat de mariage n'a pas été insinué. Je crois que l'insinuation n'était pas nécessaire dans le cas présent, ainsi qu'on le verra ci-après.

Durant la communauté, après la mort de François David, le père de la demanderesse, sa mère, Marie Josephte Dagenois, fit donation au défendeur, Paschal Gagnon, et à la demanderesse, son épouse, de lui autorisée à cet effet, ses gendre et fille, pour leur *sortir nature de conquêt*, et pour tenir lieu à la dite demanderesse de ses droits mobiliers et immobiliers dans les biens dépendant de la succession du dit défunt François David, son père, de *tout* ce que la dite

donatrice pourrait prétendre dans "un immeuble" y désigné, situé à la côte Saint-Michel, laquelle terre lui appartenait comme suit, savoir : $1\frac{1}{2}$ arpent pour sa part des conquêts de la communauté qui avait existé entre elle et feu Jean Bte. Vanier, son premier mari, et $2\frac{1}{4}$ arpents pour sa part des conquêts de la communauté qui avait existé entre elle et le dit F. David, son second mari, les 2 autres arpents et quart appartenant déjà à la dite demanderesse comme héritière du dit F. David, son père ; dont et du tout, cependant, la donatrice avait droit à la jouissance, sa vie durant ; cette donation fut dûment enregistrée le 4 juillet, 1843.

Je dois remarquer, de suite, que les $2\frac{1}{4}$ arpents, que la demanderesse avait dans cet immeuble, de la succession de son père, était un propre à elle qui tombait sous l'effet de la clause d'ameublement général ; et que la vraie difficulté n'existe que quant aux $3\frac{1}{4}$ arpents, qui provenaient de la donatrice ; savoir, si la moitié seulement d'iceux tombait aussi sous l'effet de la même clause, et si l'autre moitié ne devenait pas un vrai conquêt pour le défendeur, aux termes de la donation.

En mai, 1861, le défendeur, durant la communauté, a hypothéqué tout l'immeuble en faveur de l'intervenante pour la sûreté du montant d'un prêt de \$1.800, et l'obligation du 14 mai contient une *renonciation* de la part de la demanderesse, à l'exercice de tous ses droits de douaire et autres droits matrimoniaux et avantages qu'elle pourrait, en quelque manière que ce soit, avoir, réclamer ou prétendre sur l'immeuble ainsi hypothéqué.

Cette obligation a été dûment enregistrée le 16 mai, 1861.

La demanderesse ayant obtenu sentence de séparation de biens, fit procéder à constater ses reprises et droits matrimoniaux, par M. Simard, Notaire, qui en fit son rapport, produit devant cette Cour, le 26 septembre dernier, par lequel il rapporte, que vu la renonciation de la deman-

déresse à la communauté, en date du 24 juillet, 1863, insinuée le 27 du même mois, la clause générale de reprises stipulée en son contrat de mariage, et le fait de sa minorité au jour du contrat, il lui fait reprendre le dit immeuble ci-dessus désigné, dont $2\frac{1}{2}$ arpents, y est-il-dit, lui appartenaient comme seule héritière de feu F. David, son père, et $3\frac{1}{2}$ en vertu de l'acte de donation du 29 mai, 1843, lequel immeuble il lui fait ainsi reprendre, sans autre charge que celle du paiement de \$3700, aux termes du dit acte de donation.

Dès le 17 septembre, l'intervenante avait été admise en cause pour la conservation de ses droits comme créancière du défendeur, à l'encontre des prétentions de la demanderesse.

Par sa contestation du 2 octobre, l'intervenante après avoir invoqué la clause d'ameublement général, stipulée au contrat de mariage de la demanderesse, pour elle, alors mineure, par ses père et mère, et aussi la clause de la donation du 29 mars, 1843, par laquelle il est stipulé que le dit immeuble serait un conquêt de la communauté existant alors entre la demanderesse et le défendeur, demande à ce que ce dit immeuble soit déclaré être un conquêt de la communauté, et comme tel affecté et hypothéqué à son obligation du 14 mai, 1861, avec intérêt du 1er mai, 1863, et que le dit rapport soit à cet égard mis de côté, avec dépens contre la demanderesse.

La réponse à cette contestation repose sur ce que l'immeuble en question était parvenu à la demanderesse, par héritage et par donation entrevus en ligne directe de ses père et mère, et que la dite donation avait été faite à cause d'elle, et pour elle dite demanderesse, et qu'il devait lui revenir en entier, en vertu de la clause de reprise.

Puis, que la clause d'ameublement du contrat de mariage est nulle, parce que la dite demanderesse était alors mineure, et que la clause d'ameublement, en l'acte

de donation est aussi nulle de plein droit, la dite *Marie Josephite Dagenais*, n'ayant pas eu le droit de faire telle clause d'ameublement, *mais il n'est pas dit pourquoi.*

Que supposant la légalité des dites clauses d'ameublement, la demanderesse renonçant à la communauté avait, en vertu de la clause de reprise, droit de reprendre l'immeuble qu'elle trouvait en nature dans la communauté.

Que tout ce que l'intervenante pourrait demander, serait que le rapport fut amendé de manière à rembourser au défendeur, ou à la communauté, la somme de \$540, étant le montant capitalisé de six années de rente et pension viagère payées par la communauté, pendant six ans, durant la vie de la dite donataire.

Concluant et offrant de faire amender le rapport à la charge de rembourser, sur et à même la partie du dit immeuble qu'elle tient de sa mère, en vertu de la dite donation, la dite somme de \$540, mais que dans tous les cas, elle soit déclarée propriétaire de tout le dit immeuble.

Les prétentions réciproques des parties étant maintenant exposées, il s'agit de les régler et déterminer suivant ce qui peut leur appartenir en loi.

La première prétention de la demanderesse, est que l'ameublement général stipulé en son contrat de mariage était nul, parcequ'elle était mineure, et qu'elle n'avait pas été autorisée à le faire, et aussi parce que le contrat de mariage n'avait pas été insinué.

1o. Sur cette première question, il faut de suite remarquer que la demanderesse n'était pas une mineure, à proprement parler, puisqu'elle avait ses père et mère, stipulant pour elle au contrat, la dotant de leurs biens présents ou à venir, et auxquels elle pouvait prétendre comme héritière de l'un et de l'autre.—Elle n'était pas dans le cas d'une mineure mariée par son tuteur; car alors, si l'ameublement est considérable il faut autorisation judiciaire, cas

tout différent du nôtre. La demanderesse se mariant en 1838, n'avait droit qu'à ce que ses père et mère, qui la mariaient, voudraient bien lui donner, à telle condition et selon qu'il pouvait leur être agréable, d'après la maxime que chacun peut mettre à son don, telle condition qu'il lui plait.

Sur ce point, je citerai Argou, Vol. 2., p. 95.

“ Les père et mère qui marient leurs enfants mineurs, les étrangers même qui leur font des donations par contrat de mariage, peuvent stipuler que les immeubles donnés entreront dans la communauté ; et à cet effet, qu'ils demeureront ameublis, ou pour le tout, ou pour partie seulement. Mais quand un mineur, qui n'a que des immeubles, est marié *par son tuteur*, pour faire un ameublement valable il faut qu'il soit fait par un avis de parents, homologué en justice. ”

Nouveau Denisart, vbo. Ameublement, § 2., p. 529.

“ Les père et mère qui dotent leurs enfants mineurs, les étrangers même qui leur font des donations par contrat de mariage, peuvent stipuler que les héritages qu'ils leur donnent entreront pour le tout dans la communauté conjugale, parcequ'il est permis d'imposer à sa libéralité telle condition que l'on veut.

“ Dans les coutumes même qui ne permettent pas de disposer, sans réserve, de son *propre* entrevifs, il paraît que la faveur accordée parmi nous aux contrats de mariage, doit rendre à cet égard aux père et mère, lorsqu'ils dotent leurs enfants, la liberté entière que la loi leur ôte dans d'autres circonstances. ”

Puis, il mentionne les exceptions au cas où c'est le *tuteur* qui marie son *mineur*, cas tout différent du mariage d'un enfant mineur par ses père et mère stipulant pour lui au contrat.

C'est en vain que la demanderesse représente que le défendeur n'a rien apporté, qu'il n'avait rien lors du mariage, et qu'il a mal administré les biens qu'elle a ameublis. Cela ne doit pas influencer sur la question légale.

20. Sur la nécessité de l'insinuation, il faut remarquer qu'il s'agit d'un ameublement général et réciproque, ce qui est différent du cas où l'un des conjoints seulement ameublit pour donner à l'autre conjoint.

Petite Coutume de Ferrière, 2d Vol., art. 284, p. 252.

Sur l'ameublement particulier ou par un des deux conjoints, *secus*, quand il est réciproque, parce qu'au premier cas, c'est une donation au profit de celui dont les biens ne sont pas ameublis, au cas qu'il survive ; au second, c'est une convention matrimoniale, laquelle ne semble pas sujette à insinuation :

Il dit, cependant, "*néanmoins, pour sûreté, il est bien de faire insinuer.*"

Quand ce qui est donné par père et mère en un contrat de mariage, l'est par forme de constitution de dot, c'est une convention matrimoniale et une dotation, plutôt qu'une donation, et ainsi il n'est pas besoin d'insinuation.

Au grand Coutumier, Vol. 3., p. 299, sur l'article 284.

"Que si l'ameublement est réciproque, comme s'il est convenu, que les conjoints mettront en communauté tous leurs propres, on tient que c'est une convention, qui n'est point sujette à insinuation."

"C'est le sentiment de M. Le Prestre, No. 31, qui dit avoir été ainsi jugé par arrêt du 14 février, 1595."

"..... Ce n'est pas l'esprit de l'ordonnance, que telle convention soit sujette à l'insinuation. La raison est, que les ordonnances faites pour les insinuations ne regardent que l'intérêt des créanciers et des héritiers. Or cette convention d'ameublement ne préjudicie pas aux créan-

“ *ciers du mari* et de la femme, ou de la femme seule qui
 “ doivent être payés tant sur les *biens ameublés*, que sur les
 “ autres biens de la communauté.”

Je pense donc que le défaut d'insinuation ne peut préjudicier à l'ameublement, dans le cas présent, aux créanciers de la communauté dans laquelle sont tombés les biens ameublés.

Il faut donc conclure que la clause d'ameublement au dit contrat de mariage doit avoir tout son effet, et que ce que la demanderesse a appréhendé de la succession de son père, le dit François David, 2½ arpents du dit immeuble, sont tombés dans sa communauté et en sont devenus des conquêts sujets aux dettes contractées par son mari, le défendeur, durant la communauté.

Maintenant, passons à la considération de ce qui a fait l'objet de la donation du 29 mars, 1843, savoir des 3½ arpents du dit immeuble donnés par la mère survivante, à son gendre, le défendeur, et à sa fille, ainsi qu'il est dit, pour leur sortir nature de conquêt, et ne perdons pas de vue que cet acte de donation était jusqu'à un certain point, et même véritablement, la confirmation de l'intention des parties, et des conventions de mariage de la demanderesse et du défendeur, par lesquelles la donatrice, sous l'autorisation du dit François David, avait déjà stipulé un ameublement général au contrat de mariage des dits deux époux, de tous leurs biens meubles et immeubles, alors présents et futurs, et nous arriverons à connaître quelle partie la demanderesse peut réclamer en vertu de la clause de reprise, et quelle partie devra rester au défendeur.

Les autorités suivantes feront voir qu'une donation dans ces termes et dans ces circonstances, fait de l'immeuble donné un vrai conquêt de communauté, lequel suivant les termes de la donation et du don, ne sera sujet à rapport que pour la moitié ainsi donnée à la fille du donateur, l'autre moitié appartenant à l'autre conjoint comme conquêt.

Pothier, Communauté, No. 172.

“ Néanmoins, si le père ou la mère de l'un des conjoints, par la donation qu'ils lui ont faite d'un héritage, soit par le contrat de mariage, soit depuis le mariage, avaient expressément déclaré par l'acte de donation, que leur volonté était que l'héritage donné, entrât en la communauté de ce conjoint ; cet héritage y entrerait ; cette clause de la donation serait une espèce d'ameublissement de cet héritage. ”

Toullier, Vol. 12, No. 142.

Ferrière, Grand Cout. de Paris, Art. 246., vol. 2, p. 112.

Ferrière, Grand Coutumier., vol. 3, p. 643, No. 16.

“ Que si le père de la fille donne un immeuble à son gendre et à sa fille pendant leur mariage, pour être *conquêt de leur communauté*, il y tombera incontestablement par cette déclaration.

Idem, No. 19.

Lebrun, Communauté, p. 143, No. 34.

Enfin, Lacombe, vbo. Ameublissement, p. 27, No. 3.

“ Mais quand il est dit que l'immeuble entrera en communauté et sera réputé conquêt, ce qui est le *véritable ameublissement*, en ce cas, le mari en peut disposer comme d'un autre *conquêt*.

Quant à l'effet de l'ameublissement en pareil cas, ou au cas de celui stipulé par mariage, selon tous les auteurs il met et rend les immeubles qui en sont frappés biens de la communauté comme les meubles mêmes, et le mari peut les vendre, aliéner et hypothéquer, de la même manière qu'il peut disposer du mobilier et des conquêts de la communauté dont il est *maître*. C'est le langage de Toullier, vol. 12, No. 306. Aussi bien qu'au mot Ameublissement, dans Denisart, No. 2, p. 527.

Le mari a la faculté de *disposer* des fonds que sa femme a ameublis, aussi librement que de tout autre effet de la communauté ; et ils sont affectés également au paiement de ses dettes.

Si le mari pouvait disposer de ces immeubles, et les aliéner, il pouvait aussi, d'après la maxime, *qui peut le plus, peut le moins*, les engager et les hypothéquer valablement, c'est à tort que la demanderesse prétend que non-obstant la clause générale d'ameublement contenue en son contrat de mariage, et la donation faite comme dit ci-dessus à elle, et à son mari, le défendeur, par leur mère et belle mère, elle peut néanmoins, en vertu de la clause de reprise, reprendre francs et libres, les immeubles ameublis et donnés pour entrer en leur communauté et être conquêts d'icelle.

Si ces immeubles avaient été vendus par son mari, ainsi qu'il le pouvait, elle aurait été sans autre recours que celui de se venger sur les biens restant dans la communauté pour un montant égal à l'aliénation faite.

Ces immeubles n'ayant pas été aliénés, mais seulement hypothéqués, elle ne peut réclamer un droit plus grand que celui qu'elle aurait eu dans le cas de vente, elle peut reprendre en vertu de la clause de reprise, ce qui a été amenbli par son contrat de mariage, les $2\frac{1}{2}$ arpents de l'immeuble qu'elle tient de la succession de son père, aussi bien que la moitié indivise des $3\frac{1}{2}$ arpents qu'elle a apportés à la communauté, au moyen de la donation qui a été faite à elle, et à son mari, par sa mère. Quant à l'autre moitié de ces $3\frac{1}{2}$ arpents, elle doit rester au mari, le défendeur, à qui elle a été donnée pour lui être conquêt. C'est ce qui paraît devoir être, suivant l'autorité de Ferrière, au Grand Coutumier, vol. 3, sur l'art. 246, No. 19, p. 644, citée par l'intervenante.

“ Que si le don a été fait en directe pendant le mariage, à l'un ou à l'autre des conjoints, il est réputé fait au seul

descendant, et même quoiqu'il ait été fait à l'autre conjoint seul qui n'est pas descendant, *à moins qu'il n'apparût clairement que le donateur eût eu intention de donner au gendre ou à la brue*, auquel cas la chose donnée entrerait en communauté ; et le rapport ne se ferait à la succession du donateur que pour la moitié."

Ferrière, Cout. de Paris, Art. 246, Vol. 2, p. 112. " La 2^{ème} exception à la règle proposée en cet article est pour les immeubles donnés en ligne directe ; lesquels ne tombent point en communauté ; mais sont propres à celui ou à celle à qui ils sont donnés : Ce qui serait vrai quoique la chose fût donnée à l'un et à l'autre, *à moins qu'il ne fût porté par le contrat, que la chose serait commune au mari et à la femme ;*" or tels sont les termes mêmes de la donation du 29 mars, 1843.

Bourjon, Vol. 1er., Communauté, 2d partie, section 4, No. 16, p. 530.

" Des donations par ascendants de la femme aux conjoints durant le mariage."

Après avoir énoncé le principe que la donation est censée faite pour le tout à la fille, il dit ; " Si par la donation faite *conjointement à la fille et au gendre*, et à plus forte raison, si par celle faite au gendre seul, il était dit que le beau-père voulait gratifier son gendre personnellement ; en ce cas, l'immeuble donné ne serait propre à la fille que pour moitié, et la fille n'en doit de son chef le rapport à la succession que pour moitié ; l'un et l'autre en ce cas, étant également gratifiés ; mais il faut pour cela que cette gratification soit certaine, auquel cas il faut se tenir à l'acte : le gendre n'étant pas une personne prohibée ; &c."

Dans le cas actuel, avec la clause d'ameublement général au contrat de mariage, par les père et mère de la demanderesse, et les termes dans lesquels la donation est faite, je ne crois pas que l'on puisse douter que la donatrice voulait effectivement gratifier son gendre, pour la

moitié de l'immeuble qu'elle donnait aux conjoints. Et la demanderesse ne peut, en renonçant à la communauté, et en exerçant sa clause de reprise, prendre et rapporter ce qui est tombé dans la communauté pour appartenir à son mari, le défendeur ; et ce de même qu'elle ne serait tenue de rapporter à la succession de la donatrice, que la moitié de l'immeuble, s'il s'agissait pour elle de venir au partage de la succession de la donatrice, suivant les autorités ci-dessus tirées de Ferrière et de Bourjon.

D'après ce que dessus exposé, la demanderesse, en vertu de la clause de reprise, reprendra ce qu'elle a apporté, et qui lui est propre dans l'immeuble ci-dessus désigné, tant de la succession de son père, que de la donation de sa mère. Mais vu la clause d'ameublissement, par la conciliation de cette clause avec celle de reprise, elle ne les reprendra qu'avec les charges, hypothèques et servitudes que le mari y a imposées durant la communauté, sauf par elle à se venger sur les autres biens de son mari.

Pothier, Communauté, No. 410.

“ Lorsque le mari, pendant la communauté, a aliéné les héritages que la femme y a apportés, la femme qui exerce le droit de reprise de son apport, n'est pas fondée à les revendiquer contre les acquéreurs ; la clause pour la reprise de l'apport doit se concilier avec la clause d'ameublissement.

“ L'intention des parties, dans la clause d'ameublissement, étant principalement de donner au mari la faculté de disposer des héritages ameublis par sa femme, et de les convertir en argent quand il en aura besoin ; la clause de reprise de l'apport qui doit se concilier avec elle, ne doit pas priver le mari de cette faculté : c'est pourquoi ; lorsque le mari use du droit qu'il avait de vendre les héritages ameublis par sa femme, le droit de reprise de la femme doit en ce cas se convertir au droit de reprise de la somme que valaient les dits héritages lors de l'aliénation que le mari en a faite. ”

Ferrière, Grand Cout., Vol. 3, p. 67, No. 25.

Nouveau Denisart.

On cumule souvent avec l'ameublement des héritages d'une femme, la clause par laquelle elle est autorisée à renoncer à la communauté et en y renonçant à reprendre tout ce qu'elle y aura apporté.

Il y aurait, en quelque sorte, de l'absurdité à vouloir que cette dernière clause détruisit la première et en empêchât l'effet ; ainsi nul doute que le mari conserve le droit de disposer des héritages ameublés, nonobstant la clause de reprise.

Duranton, Vol. 15, p. 206, No. 172.

“ Si c'est un ameublement indéterminé qu'à fait la femme, elle ne peut non plus, en exerçant la reprise de ses apports, *méconnaître* les hypothèques que le mari a consenties sur ses immeubles, dans la mesure de la somme pour laquelle elle a fait l'ameublement ; et comme elle ne peut avoir d'hypothèque sur ses *propres biens*, elle ne pourrait prétendre en exercer une sur ces mêmes immeubles, par préférence à celles que le mari a consenties en vertu de la clause d'ameublement.”

Roger, Dictionnaire de Jurisprudence, Vol. 5, p. 591.

Zachariæ, Droit Civil Français, Vol. 3, p. 547.

“ Ainsi encore la femme mariée ne peut en renonçant à la communauté, revendiquer contre les tiers détenteurs des immeubles que le mari a aliénés. Mais elle est tenue de respecter les hypothèques ou les servitudes qu'il peut avoir consenties sur ces immeubles. ”

L'autorité de Duranton est très applicable au cas actuel, et ce n'est pas le cas de s'occuper des droits d'hypothèques de la demanderesse, résultant du contrat de mariage de cette dernière, à l'encontre des créanciers hypothécaires du mari, sur les biens de la communauté, qu'ils soient con-

quêts réels, ou seulement conquêts par ameublement et propres à la femme. Pour le moment il ne s'agit que de savoir, ce qui doit rester au mari comme conquêts ou biens de la communauté, et ce qui doit en sortir en vertu de la clause de la reprise de la femme, pour lui rester, avec les hypothèques et les charges que le mari y aura créées.

C'est à tort que les parties ont discuté une question de rang d'hypothèque, entre l'intervenante d'une part, et la demanderesse de l'autre. Ce n'est que plus tard que pareille question pourra surgir entre les parties, si elle peut surgir aucunement.

Il a été prétendu par l'intervenante, que vu la renonciation par la demanderesse à l'exercice de ses droits sur les immeubles hypothéqués par le mari, lors de l'obligation, elle ne pourrait exercer la clause de reprise en renonçant à la communauté. Mais c'est là une erreur. Cette renonciation de la demanderesse n'a pu lui ôter le droit de reprendre son propre ameubli; toute l'étendue de cette renonciation ne peut aller plus loin que ce que l'on trouve dans l'autorité de *Duranton ci-dessus citée*, obliger la femme à ne pas méconnaître les hypothèques du mari et ne pouvoir en exercer sur ses propres, une fois revenus dans sa main, après la fiction de l'ameublement terminée par la dissolution de la communauté et le partage des biens.

Si la demanderesse veut persister dans ses prétentions de pouvoir exercer des hypothèques résultant de son contrat de mariage à l'encontre des hypothèques de l'intervenante sur l'immeuble hypothéqué, ce ne pourra être que lorsqu'il sera procédé à la distribution des deniers provenant, soit de cette partie de l'immeuble qui reste au mari, le défendeur, ou de cette partie du même immeuble que la demanderesse reprend. Viendra alors la question de savoir si elle peut aucunement en exercer sur les biens qu'elle reprend.

Ci-suit le jugement :

La Cour, &c.—Considérant que par le contrat de mariage

en date du 15 janvier, 1838, reçu devant Racicot et confrère, notaires, entre le défendeur d'une part, stipulant pour lui, et seus François David et Marie Josephite Dagenais son épouse, de son dit mari à ce autorisés, stipulant pour la dite demanderesse, leur fille mineure, il a été stipulé un ameublissement général de tous leurs immeubles propres et acquêts, présents et futurs ; avec aussi une clause de reprise au cas de la renonciation de la demanderesse lors de la dissolution de la communauté créée par leur mariage, de tout ce qui lui serait advenu par succession ou donation durant le dit mariage.

Considérant que cette clause d'ameublissement général doit avoir tout son effet dans l'espèce actuelle, les père et mère de la dite demanderesse alors mineure ayant stipulé pour elle, ainsi qu'ils y étaient autorisés par la loi du pays, et qu'il n'était pas, non plus, nécessaire de faire insinuer le dit contrat de mariage pour donner un effet légal à la dite clause d'ameublissement, qui doit être regardée en cette circonstance comme convention matrimoniale et non comme donation :

Vu que durant la communauté de biens qui a existé entre la dite demanderesse et le dit défendeur, il lui est échu en ligne directe de la succession de feu son père, le dit François David, deux arpents et un quart indivis d'un certain immeuble désigné au rapport du praticien en cette cause, lequel immeuble est identiquement le même, sans améliorations ni détériorations, que celui mentionné en un acte de donation du 29 mars, 1843, reçu devant Racicot et confrère, notaires, mentionné au dit rapport, consenti par la dite feue Marie Josephite Dagenais, au dit défendeur, et à la dit demanderesse, pour être un conquêt de leur communauté pour trois arpents et trois quarts du dit immeuble appartenant à la dite donatrice pour sa part des conquêts de la communauté de biens qui avait existé entre elle et feu Jean-Bte. Vannier, son premier mari, et feu le dit François David, son second mari.

Vu que par cet acte de donation, la moitié indivise de ces trois arpents et trois quarts indivis du dit immeuble, a été donnée à la dite demanderesse et lui était un propre, et que l'autre moitié indivise d'iceux aux termes du dit acte de donation, a été donnée au dit défendeur et doit lui appartenir, et appartient à ce dernier, vu la renonciation de la demanderesse à leur communauté.

Considérant que vu la clause d'ameublement général stipulée au dit contrat de mariage, les parts et portions d'immeubles ci-dessus mentionnées comme étant échues à la dite demanderesse, tant de la succession de son père que par le dit acte de donation ci-dessus stipulé, sont demeurrées affectées, obligées et hypothéquées à la sûreté des hypothèques dont le dit défendeur a pu les charger durant la durée de la dite communauté, et nommément à l'hypothèque spéciale résultant de l'obligation du 14 mai, 1861, consentie par le défendeur à la dite intervenante, et reçue devant M. Doucet et confrère, notaires, à la sûreté du paiement de laquelle obligation il a affecté et hypothéqué la totalité du dit immeuble ci-dessus désigné, tant pour les parts et portions que la demanderesse pouvait y prétendre de son chef comme héritière de son père, que pour les portions qui lui ont été données par le dit acte de donation du 29 mars, 1843 ; Et que vu tout ce que dessus, la dite demanderesse ne peut en vertu de la clause de reprise stipulée en sa faveur au dit contrat de mariage, reprendre que les portions du dit immeuble qui lui sont advenues de la succession de son père, et par la donation qui lui en a été faite par sa dite mère, pour la moitié indivise de ce qui en a fait l'objet ; et ce qu'avec les charges et hypothèques que le dit défendeur peut y avoir créées et imposées durant la communauté ; et que quant à l'autre moitié indivise des dits trois arpents et trois quarts indivis du dit immeuble, ainsi donnée comme susdit au dit défendeur, elle doit lui rester en entier, vu la renonciation de la dite demanderesse à la dite communauté :

A renvoyé et renvoie le dit rapport dont l'homologation est demandée par la dite demanderesse ; et a ordonné et ordonne qu'il soit procédé par le dit M. Simard, ou par tel notaire qui sera nommé par cette Cour, sur la demande de la demanderesse, à constater et établir les reprises et droits matrimoniaux de la demanderesse contre son mari, en obéissance au jugement interlocutoire du 19 septembre, 1863, mais conformément à ce qui est prescrit par le présent jugement, en autant qu'il statue sur les droits respectifs de la demanderesse, du défendeur et de l'intervenante. La Cour réservant à cette dernière de faire valoir, ainsi qu'il y aura lieu ci-après, ses droits et actions hypothécaires, contre la dite demanderesse et le dit défendeur, sur les parts et portions indivises du dit immeuble, dont ils demeureront propriétaires.

Le tout avec dépens de la contestation contre la demanderesse.

MOUSSEAU, pour la demanderesse.

BÉLANGER, conseil.

JUDAH, pour l'intervenante.

COURT DE CIRCUIT.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 1868. { PARENT..... Demandeur.
vs.
TALBOT..... Défendeur.

Jugé :—Qu'un créancier ne peut obtenir jugement contre son débiteur, lorsque ce dernier a été condamné comme tiers-saisi dans une autre cause où le créancier était défendeur ; et surtout quand le tiers-saisi a commencé à satisfaire au jugement rendu contre lui.

Held :—That a creditor cannot recover against his debtor, if the latter has been condemned as garnishee in another case in which the creditor was defendant ; and this more especially when he has commenced to satisfy the judgment rendered against him as such garnishee.

Jugement rendu le 24 décembre, 1863.

L'action avait été intentée pour ouvrages faits et matériaux fournis au défendeur dans le courant de juin, 1861.

A cette action le défendeur plaida paiement, et de plus, que le 4 décembre, 1861, il avait été condamné comme tiers-saisi dans une cause où le demandeur était défendeur pour une plus forte somme que celle réclamée par l'action.

ANGERS, pour le demandeur, maintint que son action était bien fondée, et que le plaidoyer du défendeur était insuffisant ; que le jugement rendu contre le défendeur, comme tiers-saisi, dans une autre cause, n'était qu'un jugement par défaut dont le défendeur pouvait se faire relever ; que pour se libérer de la présente demande, le défendeur devait déposer avec son plaidoyer le montant du jugement obtenu contre lui comme tiers-saisi, et que le seul fait d'avoir été condamné comme tiers-saisi dans une autre cause, n'était pas suffisant pour empêcher le demandeur d'obtenir un jugement dans la présente cause. Il cita la cause de Duvernay et Dessaulles où la question avait été ainsi décidée. (1).

TOSIGNANT, pour le défendeur, prouva à l'enquête que le

(1) 4 Déc. des Trib. du B.-C., p. 142.

défendeur avait payé la plus grande partie du jugement rendu contre lui comme tiers-saisi. Il soutint que le plaider du défendeur était bien fondé, et qu'ayant payé une partie du jugement rendu contre lui comme tiers-saisi, il n'était pas tenu à d'autres formalités que celles qu'il avait observées ; que s'il était nécessaire pour le défendeur de déposer au Greffe le montant du jugement rendu contre lui comme tiers-saisi pour se libérer de la demande en cette cause, la preuve qu'il avait payé une partie de ce jugement était au moins équivalente à un dépôt ; que le demandeur ne pouvait obtenir aucune condamnation contre lui, attendu que le jugement rendu contre lui comme tiers-saisi, était pour une plus forte somme que celle réclamée par la présente action, et que nonobstant que ce jugement fut rendu par défaut, le tiers-saisi s'y était soumis en commençant de le satisfaire en payant la plus grande partie à l'acquit du présent demandeur.

TASCHEREAU, Juge.—On prétend qu'il n'y a pas identité de dette, mais le contraire est prouvé. Le défendeur a été condamné en faveur d'un nommé Godbout à payer une somme de £9, £4 ou £5 ont été payés, et parce que la balance n'a pas encore été payée le demandeur prétend qu'il a droit de forcer le défendeur de déposer la balance en Cour. Ceci pourrait se faire s'il n'y avait pas eu un jugement final déjà rendu, car à quoi bon soumettre un défendeur à de nouveaux frais sans nécessité. En regardant la cause de Duvernay et Dessaulles citée par le demandeur, l'on voit qu'il n'y a point d'analogie entre cette cause là et la présente.

Jugement, action renvoyée avec dépens.

CASAVLT, LANGLOIS et ANGERS, pour le demandeur.

TALBOT et TOUSIGNANT, pour le défendeur.

COUR SUPÉRIEURE.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 921. { STILLINGS, et vir..... Demandeurs.
 vs.
 McGILLIS..... Défendeur.
 et
 COVENEY..... Opposant.

Jugé :—Qu'un individu qui a avancé des deniers pour la construction d'un mur mitoyen, entre lui et son voisin, ne pourra réclamer un privilège, sur vente par décret de l'héritage voisin, à l'encontre des créanciers hypothécaires sur tel héritage, s'il n'a observé les formalités voulues par la loi des enregistrements, cap. 37, Stat. Ref. du Bas-Canada, sec. 26, sous-sec. 4, et ce quoique la valeur de l'héritage ait été augmentée par la construction de tel mur.

Held :—That a party who has advanced monies for the erection of a *mitoyen* wall between himself and his neighbor, cannot upon sale by *décret* of the neighboring property, claim a privilege or preference to the hypothecary creditors upon such property, if he has not observed the formalities prescribed by the registry law, cap. 37, Con. Stat. of Lower-Canada, sec. 26, sub-sec. 4, and this notwithstanding that the value of the property has been increased by the erection of such wall.

Jugement rendu le 14me jour d'Octobre, 1863.

La demanderesse était créancière hypothécaire du défendeur en vertu d'une obligation notariée dûment enregistrée, et, ayant obtenu jugement contre son débiteur, elle fit saisir et vendre ses immeubles, et notamment un emplacement situé au faubourg St. Louis de la cité de Québec.

Le nommé Coveney se porta opposant au décret, réclamant par privilège une somme de £9 13 4. Par son opposition il alléguait un titre par lequel il était devenu l'acquéreur d'un certain emplacement situé en la cité de Québec.

Que l'emplacement saisi et vendu dans la cause, appartenant au défendeur, était contigu à l'emplacement du dit opposant, et que lui et le dit défendeur, antérieurement, étant propriétaires d'emplacements contigus l'un à l'autre, avaient procédé à un bornage de leurs propriétés respectives.

Que la ligne de division entre les parties ayant été établie par le procès-verbal de bornage, il fut convenu entre elles qu'un

mur mitoyen serait érigé pour diviser leurs propriétés respectives, à frais communs, et qu'en exécution de ce marché il fut de fait érigé un mur mitoyen entre elles, lequel avait coûté une somme de £19 6s 8d, qui avait été payée en entier par le dit opposant, la moitié de laquelle lui était due par le dit défendeur.

Que la propriété du défendeur avait été augmentée en valeur, jusqu'à concurrence de la somme de £9 13s 4d, moitié du coût de tout le dit mur mitoyen ; et qu'en raison de ce que par lui allégué, lui le dit opposant avait droit, sur le produit de la vente du dit immeuble, d'être payé par privilège, et en préférence à tous autres créanciers du défendeur, la dite somme de £9 13s 4d, et il prit des conclusions en conséquence. Par le projet de distribution et de collocation préparé par l'officier de la Cour, Coveney fut colloqué au préjudice de la demanderesse, conformément aux conclusions de son opposition ; sur ce, contestation du rapport de distribution de la part de la demanderesse, fondée sur les raisons suivantes :

1o. Because the said Coveney hath no privilege upon the proceeds of the immoveable property in this cause sold, preferable to the *hypothèque* of the said Mary Ann Stillings.

2o. Because the said Edward Coveney, doth not claim as, and is not an architect, builder or other workman, nor doth he claim as subrogated to the privilege of an architect, builder or other workman, representing a *devis et marché*.

3o. Because no architect, builder or workman can claim a privilege, such as the privilege claimed in this cause, without having observed the formalities prescribed by the fourth sub. sec. of the twenty-sixth section, of chap. 37, Con. Stats. of Lower-Canada.

4o. Because the said Edward Coveney doth not allege the registration of any *procès-verbal* or other document which could enable him to claim a privilege.

50. Because the said Edward Coveney doth not claim as the lender of money, and is not a lender of money, applied to the payment of workmen having a privilege.

60. Because no lender of money applied to the payment of workmen having a privilege, can claim a privilege such as the privilege claimed in this cause, without having observed the formalities prescribed by the said 37 cap. Con. Stats. Lower-Canada, 26th sec. and the sub. sects. thereof.

70. Because supposing the said Edward Coveney had a privilege, such privilege could only attach upon that part of the proceeds of the sale in this cause, representing the division wall mentioned in his opposition.

LELIEVRE, pour la demanderesse. Le privilège ne résulte pas du droit commun, les créances privilégiées sont celles auxquelles des dispositions particulières de la loi accordent certaines prérogatives spéciales, par exemple dans le rang qu'elles doivent occuper dans le concours des autres créanciers. (1)

L'opposant, Coveney, est incapable de citer aucune loi que lui accorde, dans l'espèce, une prérogative spéciale, et donc il n'est pas dans les conditions requises pour se prévaloir du privilège qu'il réclame en la présente cause.

Notre ordonnance (2) indique quelles sont les personnes qui en pareil cas peuvent valablement réclamer le privilège que réclame Coveney, ce sont : " Les architectes, constructeurs ou autres ouvriers employés à la construction, reconstruction ou réparation de bâtisses, canaux ou autres édifices et ouvrages ; pourvu qu'il ait été fait un procès-verbal par un expert nommé par un juge de la cour supérieure du district dans lequel les bâtisses ou les lieux sont situés, " &c., &c. Cette disposition de notre ordonnance est fondée sur ce qui se pratiquait en France à ce

(1) 7 Troplong, p. 121, No. 99.

(2) 4 Vic. cap. 30, Sec. 31 :—Stat. Rel. du B.-C., cap. 37, sec. 26, sous-sec. 4.

sujet, et l'on ne saurait ouvrir un livre de droit qui traite cette matière sans trouver une autorité conforme aux prétentions de la demanderesse, je référerai plus particulièrement à Pigeau, Proc. Civ., (1) où en traitant "Des privilèges réels sur les maisons, terres, rentes, &c." il est dit : "Quatrième privilège. Les créances de ceux qui ont augmenté la valeur, par des ouvrages, réparations ou autrement ; (mais ce privilège n'a lieu que sur l'accroissement de valeur qu'a procuré cette augmentation.)"

"Il faut observer sur ces deux derniers privilèges, deux choses ; la première, que comme il serait facile à un propriétaire qui s'entendrait avec un ouvrier, de faire naître une créance simulée en faveur de celui-ci, pour ouvrages prétendus faits, on a exigé pendant longtemps, pour que l'ouvrier pût se dire créancier et avoir un privilège, qu'il y eût un devis et un marché contenant le prix et le détail des ouvrages, passés devant notaires, avec minute, ainsi qu'il était ordonné par une sentence du Châtelet, du 3 décembre, 1689, confirmée par arrêt du 31 juillet, 1690 ; etc., etc. "

Coveney n'a observé aucune des formalités voulues, il n'a pris aucune des précautions requises ; donc il n'a aucun privilège, et le projet de distribution doit être réformé.

STUART, G. O., pour Coveney, prétendit, que du moment qu'il était apparent que par le prêt de deniers, un individu avait contribué à l'augmentation d'une propriété par des réparations ou constructions sur telle propriété, il avait droit de réclamer le paiement des deniers ainsi avancés jusqu'à concurrence de la valeur de telle augmentation. La question soulevée par la contestation n'était pas quant au montant, question qui n'eut pu être soumise à la Cour que par une contestation de l'opposition, mais bien, quant à l'existence du privilège réclamé par sa partie, les autorités citées par la demanderesse, étaient en faveur du privilège réclamé ; il cita aussi la cause No. 1278, Withall vs. Pentland.

(1) 1er Pigeau, p. 810.

Le jugement qui est comme suit explique suffisamment les raisons données par l'Honorable Juge qui a décidé la cause :—

“ Considérant que l'opposant Coveney réclame sur les deniers provenant de la vente de l'immeuble saisi en cette cause, une somme d'argent pour construction par lui faite d'un mur mitoyen entre le défendeur et lui, l'opposant, sur l'immeuble saisi en cette cause : Considérant que le dit opposant n'allègue pas par son opposition filée en cette cause, qu'avant de reconstruire le dit mur il ait fait constater l'état des lieux et la nécessité de cette reconstruction par un expert dûment nommé par un juge de cette Cour, ni qu'il en eut constaté la réception par un expert nommé de la même manière, et qu'il n'apparaît pas que le privilège réclaté par l'opposant ait été en aucune manière enregistré.

Considérant, qu'en autant, l'opposant n'est que créancier chirographaire, et n'a aucun privilège sur les dits deniers à l'encontre de la demanderesse : La Cour maintient la dite contestation de la collocation du dit opposant Edward Coveney, No. 9, du rapport de distribution produit en cette cause, avec dépens contre le dit Ed. Coveney, et ordonne que le dit rapport soit amendé en conséquence, et que la dite collocation en soit retranchée. ”

LELIÈVRE, pour la demanderesse.

STUART et MURPHY, pour l'opposant.

COUR SUPÉRIEURE.—MONTREAL.

Présent :—BERTHELOT, Juge.

No. 811.	{	RAUGER.....	<i>Demandeur.</i>
		vs.	
		RAUGER.....	<i>Défendeur.</i>
		et	
		VALOIS.....	<i>Opposant.</i>

Jugé :—Que le droit de passage sur un héritage pour arriver à une enclave qui n'a pas d'autre voie d'accès, est une servitude légale dont il n'est pas nécessaire de produire un titre par écrit, lorsque la jouissance en a duré plus de trente ans.

Held :—That the right of passage upon an estate to reach a property having no other means of ingress, is a legal service, a written title to which it is not necessary to produce, when it has been used for thirty years and more.

Jugement rendu le 31 octobre, 1863.

BERTHELOT, Juge.—Il s'agit d'une opposition afin de distraire, par Valois, à une saisie de la terre du défendeur, avec l'addition suivante : “ avec en outre le chemin de sortie, tel qu'il existe, et a toujours existé, pour communiquer de la dite terre saisie au chemin de la Reine. ”

L'opposant allègue en son opposition que ce chemin de sortie dont il est ainsi question passe sur la terre par lui acquise par échange du nommé Gabriel Pilon, sans que le propriétaire de la terre saisie ait jamais eu aucun droit ou titre à icelui, et lequel chemin lui appartient en entier, à lui l'opposant.

Il conclut à ce qu'il soit déclaré être le seul propriétaire du dit chemin de sortie, et qu'il n'existe aucun droit de passage ou de chemin sur la terre de l'opposant en faveur du propriétaire de l'immeuble saisi, et à ce que la saisie du dit chemin soit déclarée nulle et de nul effet.

Cette conclusion semble fautive. L'opposant paraît être sous l'impression que par la saisie dont il s'agit, la propriété du chemin peut être mise en question, tandis qu'il ne peut s'agir que du droit qu'aurait l'adjudicataire de se

servir du chemin comme passage pour aller au chemin de la Reine.

Le défendeur conteste en disant que la terre saisie est une enclave, et n'a pas d'autre issue pour aller au chemin de la Reine que le dit chemin de sortie.

Que lui et *ses auteurs* depuis plus de 30 ans, et même 50 ans, ont toujours joui du dit chemin *animo domini*, et que cette possession publique, paisible et continue de ce chemin nécessaire et indispensable pour communiquer de sa terre à la voie publique, a eu l'effet de créer une servitude légale sur la terre de l'opposant, dont ce dernier ne pouvait lui refuser l'usage, et qu'il a par là acquis par prescription la propriété irrévocable du dit chemin de sortie, pour la dite terre saisie, et que dans ces circonstances lui et ses successeurs ont droit à la possession et propriété du dit chemin ; et conclut à ce que l'opposition soit déboutée.

L'opposant répond que la terre du défendeur n'est pas une enclave, mais qu'elle est bornée de côté par la petite Rivière Quinchien, laquelle longe le chemin de la Reine, et que le défendeur peut communiquer au chemin de la Reine sans passer sur la terre de l'opposant, et que le défendeur et ses auteurs n'ont pu, par conséquent, obtenir aucun droit de servitude ou de passage par prescription, la terre en question n'ayant jamais été et n'étant pas une enclave ; que le défendeur et ses auteurs n'ont jamais possédé le dit droit de passage pendant 30 ans, ou d'aucune manière à leur en faire acquérir le droit par la prescription, et que, par conséquent, la contestation est mal fondée.

La preuve testimoniale établit au delà de tout doute que la terre du défendeur est une enclave, et deux des trois témoins de l'opposant, admettent en transquestions: " Que le défendeur n'a pas d'autre chemin de sortie en existence pour communiquer de sa terre au chemin de la Reine de la petite Rivière, que le *chemin de sortie* saisi en cette cause, qui passe sur la terre de l'opposant."

Ce dernier a tenté de prouver que le défendeur pouvait aujourd'hui avoir accès au chemin public en plaçant son front sur cette partie de la Rivière qui se trouve maintenant avoisiner son immeuble, mais il paraît bien établi d'autre part, que ceci n'est dû qu'à des éboulements de la Rivière depuis une quinzaine d'années. Et il n'y a aucune preuve, ni même tentative de preuve, pour faire présumer que l'opposant aurait entendu profiter de ces changements des lieux, pour obliger le défendeur depuis ces quinze ans, à cesser de se servir du chemin de servitude en question, qui n'avait plus de raison d'être, s'il était réellement possible à ce dernier d'avoir issue au chemin public, sans passer sur la terre de l'opposant.

Ce n'est certainement pas par une opposition afin de distraire que l'opposant pourrait exercer l'action *négaloire* qui lui résulterait du changement des lieux.

D'ailleurs ce droit n'est pas toujours reconnu, (1) il dépend des circonstances, du laps de temps que le droit de servitude a été exercé, et pourrait même être refusé, s'il devait en résulter trop d'inconvénients à raison des bâtisses en existence et de l'exploitation des lieux, durant un long espace de temps, avec l'usage du droit de passage en un certain endroit.

Il faut donc revenir à considérer la question entre les parties irrespectivement de ce changement des lieux, réel ou prétendu, et qui ne serait survenu que depuis peu d'années, comparativement au long temps qu'avait duré auparavant l'exercice paisible, public et non interrompu de cette servitude légale ou droit de passage, résultant nécessairement de l'enclave, et fondé sur la nécessité même des lieux, et résultant de la position des héritages de l'un et de l'autre.

Or, il est bien prouvé par deux témoins, dont l'un est

(1) Dalloz, 1848, 1ère partie, page 5.

l'auteur même de l'opposant, et tous deux plus âgés que ceux de l'opposant et ayant presque toujours demeuré dans l'endroit, que le chemin ou passage en question, et dont l'usage est réclamé pour le propriétaire de la terre du défendeur, existe de fait depuis plus de 50 ans, sans aucune interruption ni changement, c'est-à-dire, pendant 15 ou 20 ans avant que les éboulements de la rivière aient opéré des changements qui auraient pu donner ouverture, au profit de l'opposant, à une demande en discontinuation de l'exercice de la servitude.

Il me reste maintenant à voir quel est l'effet légal d'un pareil état de choses pour le défendeur et l'opposant.

Je cite du 3e Vol. Toullier, No. 552.

“ Il faut donc bien distinguer le passage que la loi accorde à la nécessité pour l'exercice des fonds enclavés, du passage de simple commodité pour le service des fonds non enclavés, qui ont une issue sur la voie publique.

“ Le premier est une *servitude légale*, qui n'a besoin d'être justifiée par *aucun titre*. Son titre est *dans la loi*, dans le fait prouvé de *l'enclavement et de la nécessité*.

“ Le second ne peut être établi que par le fait de l'homme, par un titre émané du propriétaire du fonds servant, et non par la prescription sans titre.

“ En passant sur l'héritage voisin pour se rendre à la voie publique, le propriétaire du fonds enclavé ne fait qu'user de son droit ; il l'exerce *pro suo*, et un pareil passage ne peut jamais être réputé précaire, quand même le fonds servant ne serait pas clos ; car un passage fondé *par la loi et sur la nécessité* ne peut pas être réputé de simple tolérance.

No. 556. “ Le droit de passage accordé aux fonds enclavés qui n'ont pas d'issue sur la voie publique est fondé sur la nécessité.

Et ce après avoir fait remarquer au No. 554 qu'il en est différemment pour un fonds qui a une issue sur la voie publique, car alors tel passage n'est que de commodité, c'est une servitude discontinue qui ne peut s'acquérir *sans titre*, même par la plus longue possession.

Fournel, Vol. 2, p. 404, du Voisinage.

“ En général, on ne peut acquérir une servitude, *sans titre*, même quand on en aurait joui pendant 100 ans, conformément à l'article 186 de la Coutume de Paris, qui devrait sur ce point former le *droit coutumier*. ” Et puis il continue à la page 405. “ Ces principes doivent-ils recevoir une exception pour le cas où il s'agit d'une servitude de passage au profit d'un *héritage enclavé* ? Ce droit de passage pourrait il s'acquérir par prescription ? ”

Nous partageons l'avis que plusieurs auteurs justement estimés ont émis sur cette question. (1)

“ La servitude de passage, due à un héritage enclavé est légale, ont-ils dit, elle n'a besoin d'être consentie par aucun titre ; il est indispensable qu'elle existe, c'est la loi qui l'établit ; elle diffère donc du passage qui n'a point pour base une nécessité absolue et qui ne peut exister que comme servitude conventionnelle. La seule question à examiner, est donc de savoir s'il y a ou non *enclave, nécessité de passage* et par suite *servitude légale* ; si le voisin se croyait fondé à soutenir que son héritage n'est pas celui qui présente le trajet le plus court, et que tel autre voisin doit plutôt en être chargé, on ne devrait accueillir cette objection que dans le cas où l'exercice du passage ne durerait pas depuis 30 ans. Mais si ce temps est écoulé, alors il y a présomption qu'au commencement de la possession, l'état des lieux et la convenance ont été vérifiés, et que c'est parce qu'il ne pouvait s'y refuser que le propriétaire l'a souffert si longtemps sans réclamer ; et M. Pardessus

(1) Toullier, vol. 3, Nos. 551 et 552 :—Pardessus, No. 222, et suiv :—Favard, *rho.*, *Servitude*.

ajoute, que si la prescription trentenaire ne rendait pas irrévocable le lieu du passage, les propriétés deviendraient inutiles, ou ce qui serait aussi funeste, elles deviendraient l'occasion de procès ruineux. »

S'il est bien établi, comme je le pense, par la preuve que l'immeuble saisi est une enclave, et que le défendeur et ses auteurs ont joui pendant plus de 30 ans, et même de 50 ans, du droit de sortie (ainsi qu'il est exprimé au procès verbal de saisie) pour communiquer du dit immeuble au chemin de la Reine, je ne vois pas comment je pourrais refuser de faire l'application des autorités ci-dessus rapportées et de déclarer que le défendeur a acquis par prescription, tant par sa possession que par celle de ses auteurs, pendant plus de 30 ans, le droit de sortie et de passage sur la terre de l'opposant, là où il existe aujourd'hui, à titre de servitude légale et nécessitée par l'état des lieux, et que par conséquent le défendeur est bien fondé dans sa contestation de l'opposition qui doit être déboutée avec dépens. (1)

Ci-suit le jugement :

La Cour, &c.—Considérant qu'il est constaté par la preuve et la procédure que l'immeuble saisi sur le défendeur en cette cause est une enclave, sans issue au chemin de la Reine, autre que le chemin de sortie tel qu'il existe aujourd'hui sur la terre de l'opposant pour communiquer de l'immeuble saisi au dit chemin de la Reine, et mentionné au procès-verbal de saisie, et que le dit défendeur tant par lui que par ses auteurs, pendant plus de 30 ans, en a ainsi joui à titre de servitude légale et nécessitée par l'état des lieux, à l'endroit où il existe aujourd'hui, ce qui lui a fait acquérir par prescription l'usage et propriété de ce droit de sortie pour l'avenir, comme propriétaire du dit

(1) Autorités de l'opposant : Toullier, vol. 3, Nos. 547, 548, 512, 554 :—Pandectes Françaises de la Porte, vol. 5, p. 462.

immeuble saisi, jusqu'à ce qu'il intervienne des changements au contraire ; et que, par conséquent, le dit défendeur est bien fondé dans sa contestation de l'opposition, a renvoyé et débouté la dite opposition, avec dépens, et ordonne qu'il soit procédé ci-après sur la dite saisie ainsi qu'il pourra appartenir.

DORION et DORION, pour l'opposant Valois.

CHARPENTIER, pour le défendeur contestant.

COUR DE CIRCUIT.—ARTHABASKA.

Présent :—STUART, Juge.

ROUX DIT SANSCHAGRIN *Demandeur.*

VS.

LA COMPAGNIE DU GRAND TRONC DE CHEMIN
DE FER DU CANADA. *Défenderesse.*

Jugé :—1o. Que l'obligation de la Compagnie de clore la voie ferrée, ne s'étend qu'au propriétaire voisin, et que la Compagnie, lorsqu'il n'y a pas de négligence de sa part, n'est pas responsable du dommage causé à des animaux venant d'une propriété qui n'est pas contigue au chemin de fer, nonobstant qu'elle ne se soit pas conformée aux dispositions du statut.

2o. Que, dans l'espèce, il n'y avait pas négligence de la part de la Compagnie.

Held :—1o. That the obligation of the Company to fence the track, is a duty towards the adjoining owners, and that the Company, in the absence of negligence, is not liable for injuries to cattle unlawfully on the adjoining close, and thence straying on the track, notwithstanding it had not complied with the statute requirements.

2o. That, in the case submitted, there was no negligence in the Company.

Jugement rendu le 9 janvier, 1864.

Par son action le demandeur réclamait la somme de £22 10s, pour dommages causés par la défenderesse, en ce que cette dernière, par la négligence, la faute et la malice de ses employés, le ou vers le 29 juin, 1863, dans le township de Stanfold, lui avait tué cinq bêtes à cornes, qui étaient alors errant sur le chemin de fer, et que les animaux étaient allés sur le chemin de fer à raison du mauvais état de la clôture de la Compagnie.

A cette action la défenderesse plaida par une dénégation générale ; puis par exception elle alléguait que les animaux étaient errant sur des terrains n'appartenant pas au demandeur ; que la compagnie avait été exemptée de faire des clôtures par le propriétaire du terrain où erraient les animaux ; que les dits animaux, venant de sur des terres voisines de celle sur laquelle il n'y avait pas de clôture, la compagnie n'était pas responsable des dommages qui leur étaient causés, qu'elle ne l'était qu'envers le propriétaire de la terre sur laquelle il n'y avait pas de clôture.

Après que le demandeur eût procédé à la preuve des allégués de sa demande, la défenderesse fit en suite son enquête, elle prouva, entre autres choses, que les animaux venaient de sur les quatrième et cinquième terres de celle sur laquelle il n'y avait pas de clôture, et que, errant d'une propriété à une autre, ils étaient allés sur le chemin de fer où ils avaient été tués par une locomotive.

A l'argument, le procureur du demandeur maintint que la défenderesse devait être condamnée à payer les dommages réclamés en cette cause ; qu'il avait été prouvé que les animaux appartenaient au demandeur et qu'ils étaient allés sur le chemin de fer par la négligence de la compagnie, qui n'avait pas entretenu sa clôture dans un bon état, tel qu'elle y était obligée par la loi ; qu'il y avait eu malice de la part de la défenderesse, et que ni elle ni ses employés n'avaient rien fait pour éviter de causer les dommages au demandeur.

Les procureurs de la défenderesse soutinrent qu'ils avaient prouvé les allégations de leurs plaidoyers, que l'action du demandeur était mal fondée et vexatoire, et qu'elle devait être déboutée, avec dépens. Puis ils s'attachèrent fortement à démontrer que le demandeur dans la cause était coupable de négligence ; qu'il ne pouvait pas réclamer des dommages de la défenderesse en raison du mauvais état de sa clôture, parce que la cause des dommages procédait immédiatement du demandeur lui même, par

le mauvais état de ses clôtures avec ses voisins ; que ses animaux avaient d'abord été sur les propriétés voisines et de là, errant d'une propriété à l'autre, étaient allés sur le chemin de fer où ils avaient été tués.

Enfin que la défenderesse n'était point responsable des dommages causés à des animaux errants sur le chemin de fer, venant de sur des propriétés qui n'y adjoignaient pas, et qu'elle ne pouvait être responsable que des dommages causés au propriétaire de la propriété adjoignant le chemin de fer seulement, quand ce propriétaire n'était pas coupable de négligence et que les dommages étaient causés par la compagnie, résultant de ce qu'elle ne s'était pas conformée aux règles qui lui étaient imposées par la loi. (1)

Jugement :—Action renvoyée, sans frais.

PACAUD, pour le demandeur.

TALBOT et TOUSIGNANT, pour la défenderesse.

(1) *Pierce on American Railway Law*, pp. 333 et seq.

Rae, plaintiff vs. The Grand Tronc R. R. Co., defendants. Judgment rendered at Sherbrooke, in 1859.

The demand was for twenty five pounds, the value of a mare killed on the Railway track by the defendant's engine, to which the defendants pleaded that the line of Railway did not run through the plaintiff's land, and that the Company was not bound to fence against animals straying and trespassing on their track.

SHORT, Justice :—I must, in this case, support the defendants' plea. It is proved that the Railway did not run through the plaintiff's land. That his mare was straying on the highway some distance from home. That the mare with other horses was returning from the direction of Waterville to Hatley on the Queen's highway, and the horses were driven from the highway through the yard of one Bliss, on to the Railway track, up an embankment from 20 to 30 feet high which has been left unfenced for several months by reason of certain repairs to a culvert which had been damaged or washed away by a flood.

The defendants are undoubtedly bound by law to fence their Road for the protection of those through whose lands their railway runs and for the protection of their cattle, &c., from accidents, and would most probably be held liable to passengers and freighters on their cars, should an accident happen to any person, or damage to goods be suffered by any accident caused by cattle straying on their track by deficiency in their fences. But the question here is whether a plaintiff whose horses and cattle have strayed on to the railway track where they are trespassers, can recover the value of an animal killed under such circumstances. The Court is of opinion he cannot. The action must therefore be dismissed. I understand there are two other cases brought against the Company for damages suffered at the same time under similar circumstances.

SANBORN and BROOKS, for plaintiff.

ROBERTSON, for defendants.

Superior Court, Montreal.

Dubord, plaintiff, vs. the G. T. R. Co., defendant.—Badgley, Justice, judgment the 27th February 1868.

The Court, &c.—Considering that the plaintiff hath not established the material

QUEEN'S BENCH, }
APPEAL SIDE.

DISTRICT OF QUEBEC.

Before: — AYLWIN, DUVAL, MEREDITH, MONDELET and
BERTHELOT, Justices.

ALFORD, *Appellant.*

and

THE MAYOR, COUNCILLORS AND CITIZENS OF
THE CITY OF QUEBEC *Respondents.*

Held:—That a plaintiff who has procured the sale of the effects of a defendant under a writ of execution, is not entitled to be paid out of the proceeds of such sale the full amount of the costs incurred by him upon contestation of his action, the costs for which he has a privilege being only the costs as in an action decided upon the merits *ex parte*, with *enquête*.

Jugé:—Qu'un demandeur qui a fait vendre les effets d'un défendeur, en vertu d'un writ d'exécution, n'a pas le droit d'être payé sur le produit de telle vente, tous les frais encourus par lui sur contestation de son action; les frais pour lesquels il a un privilège, n'étant que les frais comme dans une action jugée sur mérites *ex parte*, avec *enquête*.

Judgment rendered the 15th of June, 1863.

The moveable effects of the defendant having been sold under a writ of execution issued at the instance of the plaintiff, and the sum of \$121,76 having been realized from the sale thereof, the Mayor, Concillors and Citizens of the City of Quebec, the respondents, filed an opposition *afin de conserver*, claiming the sum of \$79,45, for assessments due for the year then last past, and praying to be collocated for, and paid the said sum out of the proceeds of the said sale, by privilege, and in preference to all other creditors, according to law. (1)

The deputy prothonotary drew up a report of distribution, collocating the plaintiff, in the fourth item thereof, by privilege, for the sum of \$81,35, being the amount of the whole of the costs taxed in favor of the plaintiff in the said cause.

servants of the declaration, and that the horses in question were allowed by the negligence of the plaintiff, his agents or servants in charge of them, to stray at their pleasure, and did thereby stray on to the track of the defendants' Railway, and were thereby trespassers thereon; doth dismiss the plaintiff's action, with costs.

(1) 22. Vis. Cap. 30, sec. 19, of 1863.

The respondents contested this item of the report, maintaining, that if the plaintiff was entitled to be collocated, by privilege and in preference to the respondents, for any sum of money whatsoever, as privileged costs, it could only be for the sum of \$27, and prayed that the report of distribution in this particular should be amended.

By the judgment rendered, the contestation was maintained. It was from this judgment that the appeal was instituted.

POPE, R. for respondents :—It is contended on behalf of the respondents, that the principle upon which costs are held privileged is, that they have been necessarily incurred in the interest of all the creditors, and that any creditor would necessarily have to incur such costs in order to bring the defendant's effects to sale, and such costs alone are considered *frais de justice*, and as such, privileged. (1) The equity and justice of this principle is undoubted ; but it by no means follows that the whole of a creditor's taxed costs are *frais de justice*, or such costs as any other creditor would necessarily have had to incur, because a defendant may have a good ground of defence to a portion or the whole of one creditor's demand, and not have the shadow of a defence to that of another, by which means the heavy expenses of a contested cause and voluminous *enquête*, would be incurred, in the interest of one creditor only, and which costs he would receive by privilege, to the detriment of the other creditors, whose claims would not have occasioned any such contestation, or expensive *enquête*. The practice of the Courts, therefore, has been of late, to hold as privileged costs, such costs only as the contesting or privileged creditors would necessarily have had to incur to bring the effects of the defendant to sale, in an *ex parte* case, according to the amount of his claim, with the costs of *enquête* (2). This principle being admitted, the plaintiff

(1) 1 Troplong, Priv., et Hyp. Nos. 122, 123, 131 :—1 Pigeau, Procéd. Civ., p. 682.

(2) Michon vs. Sleigh, 6 L. C. Repts., p. 85 :—Denis vs. St.-Hilaire, 6 L. C. Repts., p. 386.

is not entitled to be collocated in preference to the respondents in any sum whatever as and for privileged costs, because by the 25th Vic., Cap. 45, sec. 28, the respondents could have brought the effects of the defendant to sale, without instituting any action, or obtaining any judgment against him, but simply by taking out a writ of execution from the Recorder's Court, here, which would have entailed no expense upon the respondents whatever. This appears to have been also the intention of the legislature, by the wording of the 18th section of the 22 Vic., Cap. 30, above cited, by which debts due to the respondents are declared privileged debts, and are to be so held in *the distribution of the proceeds* of property, whether real or personal, by all Courts of justice; the legislature thus drawing a distinction between privileged claims on the debtor's effects, and those upon *the proceeds of the sale thereof*.

Bossé, junior, *contra*.

MEREDITH, Justice :—The appellant having seized the goods and chattels of the defendant in the Court below, under a writ of *saisie-gagerte*, his claim was contested; and a judgment having been rendered in his favor, his costs were taxed at \$81.35. The prothonotary collocated the appellant, by privilege, for the whole of the said costs, in the distribution of the proceeds of the sale of the moveables which the appellant had so caused to be seized. The respondents contested this collocation, in so far as it exceeded \$27, on the ground that the appellant, in resisting the contestation of his own claim, must be considered as having acted in his own interest, and not for the benefit of the creditors generally; and therefore that the costs of the contestation ought not to be considered as privileged costs.

The Superior Court maintained the contestation; and I think rightly.

Troplong says : " Le privilège des frais de justice, prenant

“ sa source dans la *gestion d'affaires*, au profit des créanciers ; ” (1) and it appears to me impossible to regard the costs incurred by the appellant, in resisting a contestation of his own demand, as a “ *gestion d'affaires au profit des créanciers*. ”

The learned Counsel for the appellant referred to several cases (2) as establishing a jurisprudence in his favor ; but they do not appear to me to support his pretension.

The case of Denis vs. St. Hilaire, is certainly not in favor of the appellant, for in that case, the costs of contestation after full argument were deliberately rejected by a majority of the Court. And in Garneau vs. Fortin and Michon vs. Sleigh, the costs allowed as privileged costs were costs incurred upon *ex parte* proceedings ; and therefore the point upon which the present judgment turns, cannot have been raised in either of those cases. In Jarvis vs. Kelly, the costs allowed as privileged included the costs of contestation, but no attempt appears to have been made in that case to cause a distinction to be observed between the costs of contestation, and the remainder of the costs.

And in Michon vs. Sleigh, the question decided was rather a question of registration, than a question of privilege, and judging from the sum allowed, as privileged costs in that case, (£8.2.11) I infer that no costs of contestation were allowed.

The judgment of the Court below, therefore, does not seem to be opposed to any established jurisprudence, and believing as I do that it is right in principle, I think it ought to be confirmed.

Judgment confirmed.

Bossé and Bossé, for appellant.

POPE, for respondent.

(1) 1 Trop. Priv. et Hyp., p. 151, No. 131 :—see also Perdl, Priv. et Hyp., vol. 1, p. 62 :—8 Pothier, p. 812 :—6 L. C. R., p. 96.

(2) Garneau vs. Fortin, 2 L. C. R., p. 115, I am by error reported as one of

SUPERIOR COURT.—QUEBEC.

Before :—MEREDITH, Justice.

No. 1434. { TÊTU *Plaintiff.*
 vs.
 { CHINIC *Defendant.*

Held :—That immoveable property sold by *décree* is freed from all incumbrances with which it was theretofore charged, except such as are clearly expressed in the sheriff's advertisement or notice of sale; and that, in the case submitted, the property sold having been twice leased for a term of years, subject to a *canon emphytéotique* under each lease, and the first lease only having been adverted to in the notice of sale, the property sold was released from the charges affecting it under the second lease.

Jugé :—Qu'une propriété immobilière vendue par décret est purgée de toutes charges dont elle était dès avant grevée, excepté celles qui sont expressément énoncées dans l'avertissement du shérif ou avis de vente; et que, dans l'espèce, la propriété vendue ayant été deux fois louée pour plusieurs années, sujette à un *canon emphytéotique* en vertu de chaque bail, et le premier bail seul ayant été mentionné dans l'avertissement, la propriété vendue était purgée des charges qui l'affectaient en vertu du second bail.

Judgment rendered the 31st May, 1858.

MEREDITH, Justice :—The defendant is the owner of an emplacement which was conceded, subject to an annual rent of £8 5s, by an emphyteotic lease bearing date the 19th day of May, 1819, from Felix Têtu to Erastus White, and the plaintiff, as the representative of Felix Têtu, claims the arrears for 18 months of the emphyteotic rent so created. The defendant contends that the emplacement in question was purchased by the Quebec Building Society (from whom he acquired it) on the 23d day of January, 1856, at sheriff's sale, free from the charge of the said rent, and therefore that the claim of the plaintiff is unfounded.

It appears that the emplacement in question forms part of an extensive lot of land which was conceded by the nuns of the Hotel Dieu, to the Hon. William Grant, for a period of 99 years, by an emphyteotic lease, bearing date the 31st day of May, 1790; and the principal question, between the

the Judges by whom that judgment was rendered :—Jarvis vs. Kelly, 4 L. C. R., p. 75 :—Denis vs. St. Hilaire, 5 L. C. R., 386 :—Michon vs. Sleight, 6 L. C. R., p. 66, et seq., where a number of other cases are cited :—Marchildon vs. Mooney, 8 L. C. R., p. 122.

parties in this cause, is whether the Quebec Building Society, now represented by the defendant, acquired the lot of land in question subject to the charges contained in the emphyteotic lease of 1790, or subject to those contained in the emphyteotic lease of 1819. The description in the sheriff's advertisements and in the sheriff's deed which has given rise to this difficulty is as follows: "The unexpired term of the *bail emphytéotique* herein after mentioned, that is to say: a certain lot or parcel of ground, &c., &c., subject to the charges and conditions mentioned in the *canon emphytéotique* dated the 31st May, 1790."

Here it may be observed that the sheriff's sale at which the Quebec Building Society (now represented by the defendant) acquired the emplacement in question, took place at the suit of the plaintiff, and under a judgment against one Harriet Martin, who had acquired that emplacement from Erastus W. White, the lessee under the emphyteotic lease of 1819. The pretension of the plaintiff is that as the land was sold as belonging to Harriet Martin, that the purchaser can have no rights other than those which she had; that she held the land under the emphyteotic lease of the year 1819; that the unexpired term of that lease was what was sold by the sheriff's sale; that although the annual rent due under the lease of 1819, is not expressly referred to in the conditions of the sale, yet that rent being an essential part of the lease sold by the sheriff, the payment of it must be deemed one of the conditions of the sale, and in support of this view, the learned counsel of the plaintiff cited the judgment of this Court in the case of *Methot vs. O'Callaghan, and Lampson* opposant. (1)

As to the words in the advertisements and deed of sale by the sheriff, referring to the emphyteotic lease of 1790, it was expressly contended, at the argument, that they did not form a part of the description of the property sold; but are the expression of a charge upon it.

These pretensions although submitted with much ability

(1) 2. L. C. Rep., 331.

by the learned counsel for the plaintiff, cannot be sanctioned by the Court. A property sold by sheriff's sale to make use of the words of Pothier : " est transféré à l'adjudicataire avec les seules charges exprimées par l'affiche ; le décret purge toutes les autres ; il éteint tous les droits de propriété, et autres droits réels, que les tiers auraient pu avoir dans cet héritage. " (1)

It is true that the property in question is spoken of in the proceedings of the sheriff " as the unexpired term of the emphyteotic lease hereinafter mentioned. " But the only emphyteotic lease mentioned in those proceedings is the lease of the year 1790, and not the lease of the year 1819 ; and therefore the charges preserved according to the authority cited from Pothier are those stipulated in the lease of 1790, adverted to in the sheriff's advertisements, and not those of the lease of 1819, which is in no way referred to in the proceedings of the sheriff. The point urged at the argument that the lease of 1790 is referred to by the sheriff, not as part of the description, but "*as a charge upon it,*" is directly at variance with the plaintiff's declaration, which, after giving the description of the defendant's property, *according to the sheriff's sale*, continues as follows : " alléguant le dit demandeur, que le bail ainsi saisi et vendu, et l'immeuble ci-dessus désigné, sont ceux ci-dessus désignés en premier lieu, le dit bail étant *erronément indiqué comme étant du trente et unième jour de mai, 1790,* au lieu qu'il était de fait du 19 mai, 1819. "

The pretension on the part of the plaintiff that the emphyteotic lease in question was sold subject to the emphyteotic rent claimed by the present action, is also directly at variance with the opposition filed by him in the case in which that property was sold ; and by which opposition he claimed the capital on the ground of the rent having been extinguished by the sheriff's sale. The court then held, as I now hold, that the rent was purged by the sheriff's sale ; but the plaintiff's claim, not having been duly registered,

(1) Pothier, Proc. Civ., p. 255 :—De Héricourt, p. 147 :—Pigeau, Vol. 1, p. 779 :—Murphy vs. O'Donovan, and Lampson, 2 L. C. R., p. 333.

was held to be inoperative as against a subsequent duly registered hypothec. (1)

The present judgment is not at variance with the decision rendered in *Methot vs. O'Callaghan, and Lampson*, to which the attention of the Court was particularly drawn by the learned counsel of the plaintiff.

In that case we held that the sale of the unexpired term of an emphyteotic lease subjects the purchaser to all the charges contained in that lease, including the annual rent ; I fully admit that doctrine ; but hold at the same time, that the defendant having purchased " subject to the charges and conditions " mentioned in the *canon emphytéotique*, dated " the 31st day of May, 1790, " cannot on that account be subject to the charges and conditions contained in the *emphyteotic lease of the 19th May, 1819*. In *Methot vs. O'Callaghan*, we held that the sale of an unexpired term of an emphyteotic lease implied an obligation to pay the rent due under such lease ; and, without in any way impugning that doctrine, I now hold that the sale of such an unexpired term, does not subject the purchaser to the *charges of two leases*.

For these reasons, I am of opinion that the property held by the defendant is not now subject to the rent payable under the emphyteotic lease of the 19th day of May, 1819, and, therefore, that the present action cannot be maintained.

The judgment is as follows :

The Court, &c.—Considering that the emphyteotic lease mentioned in the plaintiff's declaration was extinguished by the sheriff's sale, mentioned in the peremptory exception by the defendant in this cause filed, doth dismiss the present action, with costs.

ANGERS, for plaintiff.

TESSIER, U. J. for defendant.

(1) *Tétre vs. Martin*, 7, L. C. Rep., page 42.

COUR SUPÉRIEURE.—QUÉBEC.

Présent :—STUART, Juge.

No. 1642. { EVANTUREL, *et vir.*..... Demandeurs.
vs.
EVANTUREL,..... Défendeur.

Jugé :—Qu'aux termes de la 51ème règle de pratique, il est nécessaire que dans l'inscription sur le rôle de droit pour audition en droit sur les plaidoyers, le jour auquel telle audition aura lieu soit indiqué, ainsi que dans l'avis d'icelle ; sans quoi telle inscription sera déclarée nulle, et la cause sera rayée du rôle.

Held :—That under the terms of the 51st rule of practice, it is necessary that in the inscription upon the *rôle de droit* for hearing upon the pleadings, the day upon which such hearing will take place be indicated, as well as in the notice thereof; without which such inscription will be declared null, and the cause struck from the roll.

Jugement rendu le 4 février, 1864.

Dans cette cause le défendeur plaida par exception perpétuelle en droit perpétuelle, à laquelle exception les demandeurs répliquèrent en droit ; cette réplique nécessitant une audition en droit, les demandeurs inscrivirent la cause "sur le rôle de droit pour être entendue sur la défense au fonds en droit des demandeurs, à l'exception perpétuelle filée par le défendeur en cette cause."

Sur cette inscription le défendeur fit motion, qu'icelle inscription fut déclarée nulle, et que la cause fut rayée du rôle ; parce que la dite inscription ne contenait point l'appointement d'un jour pour l'audition de la dite cause, tel que voulu par la dite règle de pratique, (1) et parce que l'avis de l'inscription était aussi insuffisant et irrégulier sous le même rapport.

Règle absolue. (2)

JOLY, pour les demandeurs.

LANGLOIS, JEAN, pour le défendeur.

(1) La règle de pratique est comme suit :

LI "That no contested cause shall be heard upon any inscription on the *rôle de droit*, unless two juridical days shall have intervened between the inscription and the day appointed for the hearing."

(2) Une décision semblable fut rendue dans la cause, No. 327, Cressé vs. Baby, Jugement le 5 juin, 1862, TASCHEREAU, Juge.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 1282. { WOOD Plaintiff.
vs.
SWINBURNE Defendant.

Held :—That to inscribe for *enquêtes* and final hearing on the merits, the party so inscribing must have notified his adversary of his option so to inscribe, previous to the inscription for *enquêtes* alone.

Jugé :—Que pour inscrire pour enquête et audition finale aux mérites, la partie inscrivant ainsi doit avoir donné avis à son adversaire de son choix d'inscrire ainsi, avant l'inscription aux enquêtes seulement.

Judgment rendered the 8th February, 1864.

On the 24th of November last, the defendant inscribed the cause for *enquêtes* for the 17th December, of which inscription the plaintiff was notified : On the 27th November the plaintiff inscribed for *enquête* and merits for the 9th December, and notified the defendant of his inscription.

On the 3rd February, the defendant moved to strike the inscription *aux enquêtes* and merits, and to set aside the proceedings thereon had, for the following reasons : 1o. because the cause had been previously inscribed for *enquêtes* only : 2o. because the cause having been inscribed for *enquêtes* only, it was not competent to the plaintiff to inscribe for *enquêtes* and merits together : 3o. because the plaintiff's, inscription was irregularly made and filed, he not having, at the proper time, either by his declaration, answer or reply, or otherwise, notified his option that the cause should be inscribed for the adduction of evidence and final hearing on the merits at the same time : 4o. because previous to the defendant's inscription for *enquêtes*, the plaintiff had never declared his option that the cause should be inscribed for *enquêtes* and merits together.

It was argued for the plaintiff, that he, as *dominus litis*, had the right to inscribe either for *enquêtes* alone, or for *enquêtes* and merits as he thought proper, and that the defendant could not by inscribing for *enquêtes* alone, which

would take place several days after the sittings for *enquêtes* and merits, retard the proceedings to the prejudice of the plaintiff.

The defendant answered that either party might inscribe for *enquêtes* and merits, if the option so do had been notified to the opposite party. That if no notice of such option had been given, it was competent to either party to inscribe for *enquêtes* alone, which was the course adopted by the defendant in this case.

STUART, Justice :—The question raised on this motion involves an important point of practice : “ Whether a party who has not by his declaration, plea, answer or reply, declared his option that the cause should be inscribed for *enquêtes* and merits may so inscribe it, and this notwithstanding its previous inscription for *enquêtes* alone by the opposite party ? ” M. Justice TASCHEREAU concurs in the judgment I am about to render. In the Con. Stat. L. C. cap. 83, sec. 19, it is enacted that either party may inscribe for *enquêtes* and merits ; “ Provided that if either party in his declaration, plea, answer or reply, . . . notifies his option that such case be inscribed (at the proper time) for the adduction of evidence and final hearing on the merits at the same time, or if either party, before the inscription of such cause for the adduction of evidence, notifies to the other his option that such cause be inscribed for the adduction of evidence and final hearing at the same time. ” &c. This *proviso* gives the option to either party to inscribe for *enquêtes* and hearing, if such option is notified to the other, before a certain time. No such notice was given in this cause, the case was regularly inscribed for *enquêtes*, and immediately thereafter the opposite party inscribed for *enquêtes* and hearing. The motion must be made absolute.

HOLT and IRVINE, for plaintiff.

CAMPBELL and GIBSON, for defendant.

COUR DE CIRCUIT.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 481. { MIMANDRE..... Demandeur.
vs.
ALLARD..... Défendeur.

Jugé :—Que dans une action en dommages pour l'émanation d'un warrant de recherche, sans cause probable, l'allégation de l'absence d'aucune cause probable est suffisante, et le demandeur devra obtenir jugement, à moins que le défendeur n'établisse que telle cause probable existait.

Held :—That in an action of damages for the issuing of a search warrant, without probable cause, the allegation of the absence of any probable cause, is sufficient, and will entitle the plaintiff to a judgment, unless the defendant prove that such probable cause did actually exist.

Jugement rendu le 24 mars, 1863.

Le demandeur poursuit le défendeur pour £50 de dommages, pour avoir fait émaner et exécuter contre lui un warrant de recherche, pour certains effets félonieusement pris et volés de lui le défendeur; sans raison aucune, cause juste ou raisonnable, ou même probable; à cette action le défendeur répondit par une simple défense au fonds en fait.

A l'enquête, le demandeur prouva l'émanation et l'exécution du warrant de recherche, à l'instance du défendeur, mais ne fit aucune preuve de l'allégation que le warrant de recherche était émané sans cause juste ou raisonnable, ou même probable.

TASCHEREAU, Juge :—Cette action est en dommages, le demandeur réclame du défendeur £50 pour avoir fait émaner contre lui un warrant de recherche sans juste cause, et même sans cause probable.

A cette action le défendeur a plaidé par une défense au fonds en fait à laquelle le demandeur a répliqué généralement; à l'audition on a prétendu que le demandeur ne pouvait avoir jugement, en autant qu'il n'avait pas prouvé l'absence de cause probable de la part du défendeur pour faire émaner le warrant de recherche. J'ai eu quelques doutes dans cette cause par suite de ce que l'on a voulu substituer

les principes du droit anglais à ceux du droit français qui doit seul nous guider sur cette matière. (1)

En conséquence je ne crois pas qu'il fût nécessaire au demandeur de prouver l'absence de cause probable. Il lui suffisait de l'alléguer, et c'était au défendeur à faire cette preuve.

Jugement : La Cour, &c.—Condamne le défendeur à payer au demandeur £7 10s, et les frais.

PLAMONDON et **GUILBAULT**, pour le demandeur.

LÉGARÉ et **MALOUIN**, pour le défendeur.

CIRCUIT COURT.—QUEBEC.

Before :—**TASCHEREAU**, Justice.

No. 2241. { **HÉBERT**..... Plaintiff.
vs.
{ **PENTLAND**..... Defendant.

Held:—That bailiffs are "officers of justice," whose fees are prescribed by three years. | **Jugé:**—Que les huissiers sont "officiers de justice," dont les honoraires se prescrivent par trois ans.

Judgment rendered the 24th December, 1863.

This was an action brought by the plaintiff, a bailiff of the Court, against the defendant, a practising attorney, for the recovery of seven dollars, alleged to be due for services rendered to the defendant in the year 1857.

To this action the defendant pleaded the prescription of three years under the provisions of the Con. Stat. L. C., cap. 82. sec. 34., sub-sec. 3.

The words of the statute are : " And in all actions brought by Sheriffs and other officers of justice... for rendering any service in their official capacity, the defendant may plead three years' prescription, dating from the date of the rendering of such services... and such prescription shall be a bar

(1) 3 Campbell's Rep., p. 393.

to such action." The plaintiff contended that bailiffs were not officers of justice under this act, and that their fees could not be prescribed by three years.

Judgment :—Action dismissed.

LANGEVIN, for plaintiff.

ANDREWS and ANDREWS, for defendant.

SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 1435.	{	LEE, et al.....	Plaintiffs.
		vs.	
		KINSMAN, et al.....	Defendants.

Held :—That the failure on the part of the plaintiff to pay the entrance fee on the day of the return of a writ, does not vitiate the return which has been made.

Jugé :—Que le défaut de la part du demandeur de payer l'honoraire d'entrée le jour du rapport d'un writ, ne vicié pas le rapport qui a été fait.

Judgment rendered the 31st of December, 1863.

In the month of October last, a process *ad respondendum*, with *saisie-arrest simple* and *capias ad respondendum*, issued against the defendants, Kinsman and Johnston, returnable on the 24th of the same month. On the 20th October, the writs were returned into the office of the prothonotary by the sheriff, and the words " filed by sheriff 20 October, 1863 " with the initials of the deputy prothonotary, were endorsed on the back of the writs.

On the 4th of December, then next, the prothonotary at the request of the plaintiff certified that the process *ad respondendum*, with the writs of *saisie-arrest simple* and *capias ad respondendum*, issued in the cause on the 6th and 7th days of October, then last, and both made returnable on the 24th of October, were returned into the office of the prothonotary by the sheriff on the 20th of October, where they had since remained ; that no person had applied at the office of the

prothonotary to cause the said writs, so returned, to be entered of record before the 26th day of October, when the plaintiff had by his attorney appeared and requested that the same should be entered, when the same were entered accordingly, but that Johnston, one of the defendants, had not then nor since filed any appearance either personally or by attorney ; on this certificate the plaintiff moved for the benefit of the default recorded, and for permission to proceed *ex parte* against the defendant Johnston.

CAMPBELL, for plaintiff, in support of the motion, argued that he was entitled to proceed *ex parte* against Johnston, the defendant who had made default, because although the plaintiff had only paid the entrance fee upon the 26th October, still the writ was properly before the Court on the 24th October, the day of the return ; the sheriff had returned the writ to the prothonotary, the officer of the Court, on the 20th October, as was shown by the certificate of default, and the writ was then filed, as appeared both from the certificate of the prothonotary and the endorsement on the writ itself. If the prothonotary had refused to file the writ when it was returned by the sheriff, and it had not been entered until the 26th October, when the entrance fee was paid, then the motion for permission to proceed *ex parte* might perhaps have been refused, but this had not been done, the writ was filed on the 20th October, and the only question which could arise, was one of credit between the prothonotary and the plaintiff.

ANDREWS, appeared for the defendant, and showed cause against the granting of the motion on the ground that there could be no default recorded against a party who had not appeared in obedience to a writ, unless it was shown that the writ itself was properly before the Court ; now in this case the writ was returnable on the 24th of October, but was only entered on the 26th October, two days after the day of the return, but the law (Con. Stat. L. C. Cap. 83, sec. 9,) says : " the writ of summons shall be returned into the prothonotary's office, on the day on which it is returnable,"

the plaintiff had not complied with this provision of the law and could not now claim the benefit of another provision of the same clause of the act which awarded the default against a defendant who had not appeared on the day of return of the writ, or on the next following juridical day.

TASCHEREAU, Juge :—Dans cette cause le protonotaire a fait un certificat de défaut spécial. Le statut dit que tout writ sera rapporté le jour du retour. Le protonotaire n'a pas droit de faire aucune entrée sur le writ avant le jour du retour, mais dans cette cause il l'a fait, et maintenant c'est une question monétaire entre le demandeur et le protonotaire. Le protonotaire a droit de refuser de prendre aucun papier s'il n'est pas payé de son honoraire, et il a droit même de dire que le writ n'est pas rapporté, mais dans cette cause le writ a été rapporté et enfilé au bureau du protonotaire le 20 d'octobre, ce qui est encore prouvé par le certificat produit avec cette motion ; et si le protonotaire a jugé à propos d'entrer cette cause sans le paiement de ses honoraires, pour lesquels il a donné crédit au demandeur, le retour du writ ne peut être pour cela annulé.

Judgment, motion granted.

CAMPBELL and GIBSON, for plaintiffs.

ANDREWS and ANDREWS, for defendants.

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SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 1023. { ATKINSON, Plaintiff.
 vs.
 { NOAD, Defendant.

Held :—1o. That gas and water-pipes are fixtures, but may be removed, at the expiration of his lease, by the tenant who has fitted them up.

2o. That the sale of a house, with its appurtenances and dependencies, will include the gas and water-pipes, then fitted up in the same, unless specially reserved by the vendor.

3o. That a party failing to produce an articulation of facts, must, even in the event of success, bear the expense of his *enquête*.

Jugé :—1o. Que les tuyaux à l'eau et aux gaz sont *fixtures*, mais peuvent être emportés par le locataire qui les a posés, à l'expiration de son bail.

2o. Que la vente d'une maison, avec ses circonstances et dépendances, inclura les tuyaux à l'eau et au gaz qui sont fixés pour demeure, à moins de réserves spéciales de la part du vendeur.

3o. Qu'une partie faisant défaut de produire une articulation de faits, devra, même dans le cas où elle réusirait, supporter les frais de son enquête.

Judgment rendered the 31st December, 1863.

The plaintiff claimed from the defendant a sum of \$4000, alleged to be due in virtue of a deed of sale of a dwelling house, by the plaintiff sold to the defendant, and in which the defendant had agreed to pay \$4000, part of the purchase money, when the plaintiff should have furnished her with a registrar's certificate showing the property sold to be free from mortgages or other charges. The defendant admitted the purchase of the property, but pleaded by perpetual peremptory exception, that the property was purchased with its dependencies and appurtenances, in the condition in which it was at the time of the sale, and as it was then actually occupied by one Levey, as the tenant of the plaintiff; that at the time of the sale the property contained, as part of the appurtenances thereof, various closets, sinks, water-pipes, gas-pipes, basins, cocks, bolts, screws, nails and other fixtures, connected with and necessary for the transmission of gas and water throughout the said house, which were of great value and formed part of the appurtenances of the house, and were included therewith in the consideration or price of the property; that

notwithstanding the passing of the deed of sale, and the seizin therein given to the defendant, the plaintiff before the delivery of the premises so sold to the defendant, had illegally and without the knowledge or consent of the defendant, removed and carried away, or allowed to be removed and carried away, from the house, the closets, water and gas-pipes and other fixtures, above referred to, of the value of \$174; that the balance of the instalment or sum of \$4000, had been tendered to the plaintiff, and had been accepted by him, in full discharge of the said instalment, with the exception of the sum of \$174, which the defendant claimed she had a right to have deducted from the price of the house, as it had been lessened in value to that amount; for these reasons the defendant concluded that the action be dismissed.

Issue having been joined, the parties proceeded to *enquête*, without having previously filed articulations of fact; and the plaintiff proved that both in Canada and in Great Britain, the custom was to remove the gas-pipes and fittings, which was frequently done in Quebec by tenants on change of residence.

VANNOUVS, for the plaintiff, argued that if the water-pipes, gas-pipes, &c., were moveable, as he contended they were proved to be, then they did not form part of the property sold, and the tenant had the right to remove them, but if on the other hand, the Court should consider them immoveable, then the defendant would have to suffer the loss of them, as the pipes, &c., were in the house at the time of the sale, when Levey, the then tenant of the plaintiff, had become the tenant of the defendant, and as the defendant had permitted the removal of these pipes by her tenant, she could not now claim the value of them from the plaintiff.

HOLT, for the defendant, argued that the articles in question were fixtures, and formed part of the house, that, even if Levey, the tenant had the right, as towards his land-

lord, the plaintiff, to remove them, they still were in the house at the time of the sale, and formed part of the property sold, inasmuch as the property was sold, with its appurtenances and dependencies, as the whole then was, and as occupied by Levey, the plaintiff's tenant. (1)

TASCHEREAU, Justice :—On the 20th. March, 1862, the plaintiff sold to the defendant a house in the city of Quebec, for a certain price. The house was then occupied by one Levey, as the plaintiff's tenant, and it was agreed that the rent from the 1st February should be received by the purchaser, and that the purchaser should pay interest on the price of sale from that date. Levey left the house on the 1st of May, and removed various gas and water-pipes, water-closets, sinks, &c., of the value of \$174; an instalment of the purchase money becoming due, the defendant claimed the right to deduct the costs of replacing the various fixtures, so removed, and the questions raised by the action, are, 1st whether the articles mentioned, were, or were not, actually part of the immoveable property sold; 2nd, whether if they were not, the plaintiff was liable to the defendant for their value.

I have always been of opinion that such things as water-pipes, gas-pipes, &c., were fixtures, but a case must be decided by the evidence, and as the defendant has not by her evidence contradicted, or attempted to contradict, the plaintiff's evidence, that these pipes, &c., are removeable, I must decide that Levey, the tenant, who had placed them in the house, had the right to take them away, that is as between him and his landlord; this decision is based upon several english authorities which show that these pipes, &c. are removeable by the tenant, and upon the proof made in the cause of the facility with which they may be removed :

(1) Authorities cited by the defendant in support of his plea :
 Pothier, *Propriété*, Nos. 196, 245, 263 :—*Idem*, *Communauté*, Nos. 53, 54 60 :—*Cout. de Paris*, Art. 90 :—*Toullier*, Vol. 3, No. 15 :—*Civil Code of Louisiana*, sect. 468 :—*Code Civil*, No. 525 :—*Pothier*, *Traité des Choses*, § 1 :—*Duplessis*, Vol. 1, p. 135 :—*Pothier*, *Vente*, No. 239 :—*Archbold*, *Landlord and Tenant*, p. 324 :—*Eng. C. L. Rep.* Vol. 9, *Colgrave vs. Dias Santos* :—*Laws Relating to Buildings*, p. 271.

but the defendant was entitled to receive the house in the condition in which it was when sold to her. These pipes, &c., were in the house at the time of the sale, and were presumed to form part of the house ; the defendant could not know that they were placed there by Levey, the tenant, or that he had a right to remove them, and as Atkinson at the time of the sale made no reservation whatsoever of these pipes, &c., I decide that the water-pipes, gas-pipes, &c., as between the plaintiff and defendant formed part of the house sold by the plaintiff to the defendant, who is entitled to claim from the plaintiff the value of the pipes, &c., which were afterwards removed by his tenant. (1)

Jugement :—La Cour, &c : Considérant que par l'acte de quittance en date du 20 septembre, 1868, fait et exécuté par le demandeur en faveur de la défenderesse, le seul montant en litige entre les parties serait réduit à la somme de \$174, que la défenderesse prétend pouvoir être par elle retenue pour réparation et diminution de valeur dans la propriété à elle vendue, et ce à raison de ce que certains tuyaux et tubes servant à l'eau et au gaz, qui se trouvaient dans la dite propriété, au moment de l'achat d'icelle par la défenderesse, auraient été subséquemment enlevés par C. E. Levey, écuyer, le locataire de la dite maison, comme ayant été placés en icelle temporairement par lui, et qu'il avait droit d'enlever : Considérant que lors de la vente, les tubes et tuyaux susdits, quoique pouvant facilement être déplacés des endroits où ils furent placés par le dit Levey, étaient censés faire partie de la maison, que le demandeur vendait à la défenderesse, avec tous ses appartenances et dépendances, et telle qu'elle était occupée par le locataire Levey : Considérant que le demandeur en vendant sa maison, était tenu de réserver et d'indiquer tout ce qui ne lui appartenait pas, et qu'en autant il était tenu d'indiquer et réserver les dits tubes et tuyaux,

(1) Pothier, Com., Nos. 53, 54, 60 :—Civil Code Louisiana, sect. 456 :—Code Civil, Nap. Art. 525 :—3 Toullier, No. 15 :—Defau, Manuel du Propriétaire, p. 91 :—Chambers on Fixtures, p. 265 :—Pothier, Vente, No. 239.

comme appartenant au dit Levey, qui les avait posés, et avait le droit de les enlever à l'expiration de son bail : Considérant que quoique le dit Levey, en enlevant les dits tubes et tuyaux, ait détérioré la maison, néanmoins la conséquence de cette détérioration, est une question à être vidée entre le demandeur et le dit Levey, et non entre le demandeur et la défenderesse : Considérant que les nouveaux tubes et tuyaux, placés par la défenderesse, pour remplacer ceux enlevés par le dit Levey, et les réparations par elle faites à la maison, valaient la somme de \$174, et qu'elle pouvait légalement faire cette substitution de nouveaux tubes et tuyaux, et ces réparations, et en opposer le montant en compensation à la demande du demandeur : La Cour maintient l'exception péremptoire de la défenderesse, déclare la somme de \$174, balance due au demandeur par la défenderesse, compensée et payée par une égale somme de \$174, due par le demandeur à la défenderesse, pour valeur des réparations faites aux dits tubes et tuyaux, et renvoie l'action du demandeur, avec dépens en faveur de la défenderesse, à compter du 28 octobre, 1862, sauf que chaque partie supportera elle-même ses frais d'enquête, et ce en raison de ce que ni l'une ni l'autre n'ont jugé à propos de produire les articulations de fait requises en loi, et n'ont pas filé de consentement par écrit pour s'en dispenser mutuellement.

Vannoyous, for plaintiff.

Holt and Irvine, for the defendant,



QUEEN'S BENCH, }
APPEAL SIDE.

DISTRICT OF QUEBEC.

Before:—Sir L. H. LaFontaine, Bart., Chief-Justice, Du-
val, MEREDITH and MONDELET, Justices.

JUSON, *et al.* *Appellants.*
and
AYLWARD, *Respondent.*
and
VICE-VERSA

Held:—1c. That a consignee of goods, on board ship, cannot insist upon such goods being delivered upon a lighter, provided by himself, before payment of the freight due to the carrier required to make such delivery.

2c. That in the case of a ship coming from a foreign port, the landing of goods, after due notice, at a wharf, where such goods are usually landed, is a good delivery.

3c. That if, in such case, the owner of the goods wilfully refuse to take charge of them, and that they are injured by the inclemency of the weather, he must bear the loss himself.

Jugé:—1c. Que le consignataire d'effets sur un vaisseau, ne peut insister à ce que ses effets lui soient livrés sur un allège fourni par lui-même, avant paiement du fret dû au messenger requis de faire telle livraison.

2c. Que dans le cas d'un vaisseau arrivant d'un port étranger, le déchargement des effets, après avis donné, sur un quai, où tels effets sont ordinairement déchargés, est une livraison valable.

3c. Que si, en pareil cas, le propriétaire des effets refuse de les recevoir, et qu'ils soient endommagés par les intempéries de l'air, il devra lui-même en supporter la perte.

Judgment rendered the 1st September, 1862.

In the month of August, 1860, the appellants, plaintiffs in the Court below, caused to be shipped on board of a vessel called the *China*, whereof the respondent, defendant in the Court below, was master, certain goods and merchandize, to be carried on board of the said vessel from the port of Liverpool to the port of Quebec, and then to be delivered to the appellants *upon payment of freight*; the respondent had signed the usual bills of lading.

The *China* arrived at Quebec on the 7th October. On the same day the agent of the appellants, who had previously forwarded to him their bills of lading, arranged with the master of a schooner to receive the goods and carry them to Montreal.

On the 8th, the respondent was informed by the agent of

the appellants that they would receive the goods into a lighter or schooner. On the 9th, the *China* came to the wharf, the agent early on the same day received the custom-house permits authorizing the forwarding of the goods, and again acquainted the master of the *China* with his intention to take delivery into a lighter. About mid-day, on the 10th, the schooner which had been engaged came alongside the *China*.

When the agent of the appellants saw the respondent on the 9th, the respondent referred him to the mate, who, he said, knew more about the cargo than he did. The respondent then made no objection about delivering the goods into a lighter.

On the morning of the 10th, the agent of the respondent again saw the mate, who told him to have his lighter ready about noon, so as to commence unloading.

But a claim had been made by the consignees of the ship, which, being resisted led to the refusal to deliver the goods in the manner desired. The consignees of the ship claimed payment of the freight *in advance*. To this the agent of the appellants would not consent, but offered any security that might be required. His instructions were, to pay the freight in full so soon as the goods should have been delivered into the lighter.

It was in effect alleged in the declaration of the appellants that, upon arrival of the vessel at Quebec, being desirous of obtaining their goods and of having the same forwarded upwards from Quebec, without loss of time, they had hired a lighter to receive the goods from the vessel on the eighth of October, that they caused the lighter to be brought along side of the vessel for this purpose, and notified the master of the vessel of the fact, and that they were ready to pay the freight upon the goods as soon as they should be put on board the lighter, or that they would give

such security as would be required ; that the defendant was notified that the plaintiffs would not receive their goods upon the wharf ; that the plaintiffs had made a formal protest and demand to the above effect, and that nevertheless their goods were discharged upon the wharf ; that a portion of the goods landed upon the wharf were damaged and a portion lost, to their damage, &c., and taking conclusions accordingly.

To this action the defendant pleaded ; 1o. The general issue ; and 2o. A perpetual peremptory exception in law, by which he alleged, after setting out the bills of lading already referred to, according to their tenor, that after the arrival of the ship at Quebec, on or about the 8th October, her arrival was duly reported at the custom-house and notice thereof given as well in the newspapers, as in writing, formally, to the plaintiffs, and also verbally on several subsequent occasions, and that with all due diligence the said vessel was in the usual and accustomed manner moored to the East India wharf, at which it was usual and customary to land and deposit goods of that description, and which was a fit and proper place for that purpose ; and that immediately after the said arrival, mooring and notice, the said defendants caused the said goods to be unshipped and landed upon the said wharf, according to the usage of trade and the custom and practice at the said port of Quebec ; and thereupon, the plaintiff's goods, save and except seven bars of iron, were duly delivered by the said defendant to the said plaintiffs, without that he the said defendant ever neglected or refused so to do, or was otherwise guilty of the carelessness, negligence, misconduct, or mismanagement charged against him in the said declaration ; and that, if from the refusal of the plaintiffs to receive delivery on the wharf, or from their delay in removing the goods from the wharf, any damage was sustained, or expenses incurred, as set forth in the declaration, such loss could not be charged against the defendant. The defendant further alleged that the seven bars of iron missing were of the value of ten

dollars, and deposited the same with his plea, with 13s, 7d. for costs.

Issue having been joined, the parties proceeded to evidence, and after a hearing upon the merits, the following judgment was rendered, on the 5th September, 1860.

“ The Court, &c.—Considering that the plaintiffs had a
 “ right to obtain from the defendant delivery of their goods
 “ into a lighter, and that no legal or sufficient reason was
 “ offered by the defendant for his refusal so to deliver the
 “ same :

“ Considering that by the refusal of the defendant to de-
 “ liver the said goods to the plaintiffs in their lighter, and
 “ delivering them instead on the wharf, they, the plaintiffs,
 “ were put to the expense of wharfage, additional freight
 “ and labor, in all amounting to the sum of one hundred
 “ and forty three dollars and twenty cents, which he, the
 “ defendant, is by law bound to pay and make good to the
 “ plaintiffs :

“ Considering that the plaintiffs received delivery of their
 “ goods so made to them by the defendant on the wharf,
 “ and that such manner of delivery at the port of Quebec
 “ has been sanctioned by the Courts of this country, and
 “ that the damage sustained by the goods was caused by
 “ the default of the plaintiffs to carry away the same, and
 “ not by any act of the defendant, and consequently that he
 “ is not liable for such damage ; the Court doth adjudge
 “ and condemn the defendant to pay to the plaintiffs, for
 “ the causes hereinbefore first stated, the said sum of one
 “ hundred and forty three dollars and twenty cents, with
 “ interest thereon from the 5th day of September, 1860, and
 “ costs of suit. ”

Both parties being dissatisfied with the judgment instituted appeals, and :

• Holt, upon the appeal of Juson, *et al.* said :

It is contended, on the part of the appellants, that the Court having declared that the appellants were justified in refusing to take their goods from the ship upon the wharf, and in requiring a delivery into their lighter, could not consistently absolve the defendant from any of the consequences of his illegal conduct ; and the question comes to be : if, when the plaintiffs, the owners of the goods, were ready to receive their goods into a lighter, demanded a delivery in that manner, and were able and willing to pay the freight, and had a right to demand such delivery, the carrier could *land* the goods otherwise than at his peril ? If he landed them, was he not bound to take care of them ?

It does not seem to the appellants, that the reason assigned by the Court below for relieving the defendant for this responsibility is a sound one, either in its appreciation of the facts or of the law of the case. It cannot be said that the plaintiffs " received " the delivery on the wharf, for it is in evidence that they offered the most strenuous *resistance* to that mode of delivery ; and when the Court invokes the sanction of the Courts of this country to a delivery upon a wharf, it loses sight altogether of the *reason* of the rule, which not only in this province but in all commercial countries, declares that a carrier by water makes sufficient delivery upon a wharf. It cannot be doubted that when the master of a ship undertakes to carry a bale of goods from Liverpool to Quebec, there to be delivered to A. B., he is not bound to find out the store or place of business of A. B., and *there* deliver the goods : for his contract is only to carry from *port to port* ; and, therefore, he makes a good delivery when, after proper notice, he discharges upon a wharf.

" A ship, trading from one port to another, has not the means of carrying goods on land ; and, therefore, according to the established course of trade, a delivery on the usual wharf is such a delivery, as will discharge the carrier. But this language must be understood with the reasonable limitation and qualification, that due and

"reasonable notice thereof is given to the consignee.
 "Where, however, the consignee of goods requires the
 "goods to be delivered to him on board of the ship, and
 "directs them not to be landed on a wharf, it seems that
 "the master must obey the request; for the wharfinger has
 "no right to insist upon the goods being landed at his
 "wharf, although the vessel be moored against it." (1)

Upon this point, the *general* mode of discharging goods from a ship, there can be no difficulty, and the appellants do not understand how it is made a point at all, by the Court below; particularly, when the same judgment declares that the master of the vessel *had no right, under the circumstances of the case, to land the plaintiffs' goods.*

The sole question, then for consideration is:—Whether, or not, the plaintiffs having exercised^a a lawful right in refusing to receive delivery upon a wharf, the defendant is liable to them for the loss and damage sustained by the goods while they were being landed and afterwards while they remained upon the wharf?

It is submitted, on the part of the appellants, that the goods were still under the defendant's care and charge, and that his obligations and duty as carrier remained entire and undiminished up to the moment when the appellants, fearing the *total* dispersion and loss of their goods, and solely as a measure of protection to themselves, took possession. (2)

(1) Story on Bailments, §544, and the cases there cited.

(2) "The carrier must not leave or abandon the goods on the wharf, even though there be an inability or refusal of the consignee to receive them." 2 Kent's Comm., 817.

"A carrier is not discharged by delivering the goods to a wharfinger, whose wharf he uses, but continues to be liable until they are received by the party." Wardell vs. Mourillyan, 2 Esp. 693.

"The master will acquit himself of his obligation to deliver, if he lodge the goods with a wharfinger; provided he take care that they be so lodged with him as to make him chargeable with them. And he is bound so to land and lodge them, where there is any difficulty about freight, instead of keeping them on board."

^a Bell's Comm. on the Laws of Scotland, 469.

"If the consignee is unable, or refuses to receive the goods, the carrier is not at

JONES, for the respondent, upon the appeal of *Juson, et al.* The pretepsions of the respondent are that having established that according to law and the usage and custom of trade at the port of Quebec, he had made a good delivery by placing the goods on the wharf in the manner stated in his plea in the Court below, the Court could not legally condemn him in any sum of money whatever, but that on the contrary the action of the appellants, in the Court below, ought to have been dismissed *in toto*.

JONES, upon the appeal by the defendant Aylward, said : The appellant humbly contends, that he is entitled to a reversal of the judgment for the following, among other reasons :

1st. Because, by the contract between the parties in this cause, the appellant was bound to carry and convey the goods and effects of the said respondents, from the port of Liverpool to the port of Quebec, and there, safely deliver the same to the said respondents, and because the appellant proved and established in the Court below, that he had in all things fulfilled the said contract.

2nd. Because, in and by the three several bills of lading, produced and filed in this cause, it is stipulated that the goods of the respondents should be carried on board the said ship to the said port of Quebec, and there delivered to the respondents, and because, upon the arrival of the said vessel at the port of Quebec, and after due notice had been given to the respondents, and a reasonable time had elapsed after

"liberty to leave them on the wharf ; but it is his duty to take care of them for the owner." Story on Bailments, §545.

"If after such notice the consignee refuses to receive the goods, it is the duty of the master to take care of them for the owners ; unless the consignee is under an obligation to receive them, when they will be at his risk ; and such facts are for the jury." Angell on the Law of Carriers, §306.

"So the carrier will be excused for his delay in delivery, if the consignee is dead or absent, or has refused to receive the goods, though, in those cases, he is not justified in abandoning the goods, or by leaving them unprotected on a wharf ; his duty on the contrary, being to secure them for the owner." Ibid. §291.

"The Ordinance of Rotterdam allows the master to detain the goods for his freight, but requires him to unload and take care of them, that they may not be diminished or spoiled." Chitty on the Law of Carriers, [322].

the ship's arrival to enable them to receive and take away the said goods, the appellant safely landed and deposited the same in and upon a certain wharf, at the port of Quebec, called the East India Wharf, where by the usage and custom, at the said port of Quebec, goods of the description of those mentioned in the said several bills of lading are used and accustomed to be landed, for the use of the consignees thereof.

3rd. Because, in default of any place being stated in the bill of lading, at which the goods were to be delivered at the port of Quebec, the appellant had a right, after the arrival of the said vessel, to place and deposit the same upon one of the public wharves, for the use of the consignees thereof, after due notice to them ; and because such mode of delivery is sanctioned by the law, as well as by the usage and the custom of the port of Quebec.

4th. Because the respondents were not ready to receive their goods from the said vessel, as they were bound to do ; and because, after a sufficient time had elapsed, the appellant landed the same as he was authorized by law to do.

5th. Because it is proved and established, as well by the evidence of the respondents themselves, as by that of the appellant, that where no mention is made in the bill of lading as to the place at which the ship should discharge her cargo, it has been the invariable custom to land the goods on one of the public wharves, unless there had been an agreement, after the arrival of the vessel, between the captain and the consignee to land them otherwise.

6th. Because, if the delivery of the respondents' goods, on the said wharf, was sanctioned by law and custom, the charges claimed by the respondents, in and by their declaration in the Court below, amounting to the sum of one hundred and forty-three dollars, were not caused by any default on the part of the said appellant in the delivery of

the respondents' goods, and did not necessarily result therefrom, but the same were incurred by the respondents, in the performance of another and different contract.

HOLT, upon the appeal by the defendant said :

The defendant complains of the judgment because, although it declared him not responsible for the goods short delivered, or for the damage on the wharf, he is condemned to pay and make good the expenses of wharfage, demurrage, increased freight, labor, &c., incurred by the plaintiffs, through the defendant's having persisted in landing the goods when he was required to discharge them into the respondents' lighter.

The master of a vessel, it is submitted, has not performed his contract, as usually set forth in bills of lading, until he has *delivered*, as well as carried. He cannot demand the freight so long as the goods remain in the hold, and there is no delivery until the goods are discharged and *out* of the ship. The proposition of the respondents is that the consignee has an absolute right to demand that his goods be discharged, either from one side of the ship upon a wharf, or from the other side into a lighter, at his option. In either case, if after the goods are discharged, the freight remains unpaid, the master can prevent the goods from being taken away, in the exercise of his right of lien ; and this he may do, either forcibly, or by legal process. But the respondents are confident that no authority can anywhere be found for the position taken by the agents of the *China*, and acted upon by the appellant, viz : that they were entitled to make the payment of the freight *in advance* a condition precedent to their delivering the goods into a lighter. Nor can they invoke that salutary provision of maritime law which, as a general rule, discharges the master, carrying from port to port, from all obligation to take charge of the goods, when landed after due notice to the consignee. The reason of that rule is founded solely upon the consideration that a sea-going vessel does not

carry *by land*, and ceases to have any application when the consignee presents himself and demands a delivery in another way. The question then is :—Has the consignee such a right ? Does the master make *a good delivery*, when, contrary to the express directions of the consignee who has his lighter ready, he lands the goods upon a wharf ?

Authorities are not wanting to shew that the master is bound to discharge into a lighter, should the consignees require a delivery in that way ; and the respondents have been unable to find any warrant for the appellant's pretension that the master may grant, or deny, that demand, at his pleasure. A memorandum of authorities is furnished, on this, as on the other points which arise, though less prominently, in the case, and the respondents beg respectfully to refer to the same.

But, independently of express authorities, the question now submitted to this Honorable Court, in the light in which it is viewed by the respondents, is one of paramount importance in its bearings upon a commercial interest of surpassing magnitude which presents itself in this Province, upon, perhaps, a larger and grander scale than in most other countries in the world. The respondents allude to that most useful and most necessary class of public carriers known as *Forwarders* ; whose theatre of operations is the highway of the St. Lawrence, the more humble waters of our numerous canals, and the broad expanse of the great inland seas beyond. The amount of tonnage so employed is very considerable, in the shape of side wheel and tug steamers, barges and schooners. One of the chief elements of commercial enterprise and success, is *the saving of time*, and it would be to strike a deadly blow at the best interests of trade, to sanction by authority any measure or pretension calculated in the smallest degree to check or discourage this object of the pursuit of the enlightened merchant. And, independently of this consideration, whence does the master of a vessel derive the right, not only to inflict upon

the consignee the losses arising from mere delay, but also the various other expenses necessarily attendant upon the landing of a cargo, or of goods, the destination of which is beyond the port at which ends the voyage of the carrying ship? Such a pretension has neither the authority of reason nor of adjudged cases to support it, and is now raised for the first time. It is at variance, the respondents submit, not only with the law which the parties have made for themselves by entering into the contract which the bill of lading discloses, but also with the usage and custom of the Port of Quebec, which has obtained for a long series of years, in fact ever since there have been *forwarders* on our waters. (1)

(1) Authorities cited on the part of the respondents, upon the appeal of the defendant.

I. The master cannot detain the goods on board the ship until the freight is paid. Chitty on the Law of Carriers, [22] :—Abbott on Shipping, (9th Ed.) 310.—2 Pothier, *Charte-Partie*, No. 90.—Flanders on Shipping, §281.

II. If the consignee demand delivery into a lighter, the master cannot insist upon landing the goods on a wharf.

Chitty on the Law of Carriers, [180] :—Angell on the Law of Carriers, §313 :—Story on Bailments, §544 :—Flanders on Shipping, §279 :—Addison on Contr., 601 :—Syeds vs. Hay, 4 Term R., 260.

In this case, *Syeds vs. Hay*, which was an action of trover; the ground of defence chiefly relied upon was that the action should have been on the case, and not trover, and the defendant's counsel admitted that, under the circumstances, an action on the case lay against the carrier for a *mis-delivery*. "The action was brought by the owner against the captain of the vessel in which the goods had been shipped. They were left by the defendant in the hands of a wharfinger for the plaintiffs' use; and he might have had them at any time by sending there and paying the wharfage. But, previous to their being landed on the wharf, the plaintiffs, intending to convey them from the vessel himself, expressly directed the defendant not to land them there, which the latter promised not to do, but nevertheless he did so. The defendant by way of justification for this breach of orders and promise, attempted to set up a usage that every wharfinger, against whose wharf a vessel was moored for the purpose of unloading, as in the present case, was entitled to the wharfage free for all goods unloaded therefrom; whether landed on the wharf or not; and that therefore the wharfinger had a lien thereon, of which it was not lawful to divest him." Lord Kenyon, doubting whether the action should not have been on the case, reserved this point for the consideration of the Court, and the plaintiff had a verdict.

A rule to set aside the verdict and enter a non-suit having been granted and argued; the learned Judges KENYON, CH. J., ASHURST, J., BULLER, J., and GROSZ, J., delivered their opinions to the effect that the defendant was liable, and that the rule should be discharged. Buller, J. said :—"I am of opinion that the objection to the form of the action is not well founded. For the plaintiff gave express orders to the defendant not to land the goods on the wharf, to which the latter agreed at the time, but afterwards disobeyed those orders and delivered the goods into the possession of the wharfinger..... So here the defendant by putting these goods into the custody of a wharfinger brought a charge on the plaintiff. And this is a deliberate act, being done contrary to the orders of the owner....."

III. The master, if the freight be not paid after the goods have been discharged, may seize and detain them in the lighters or barges.

Ordee, of Wisbury, Art. 57.—Ordee, de la Marine, Book III, Tit. 3. Art. 23, Fret :—Ordee, of Rotterdam, Art. 157.—Cleirac, Art. 21, Note 3, p. 72 (Commentary on the laws of Oleron).—Consolato del Mare, 2 Magens, 106.

MEREDITH, Justice.—Messrs. Juson & Co., merchants of Hamilton, C. W., caused to be shipped on board of the *China*, whereof Thomas Aylward was master, certain goods to be carried from Liverpool to Quebec, and there to be delivered to the plaintiffs.

On the arrival of the *China*, the plaintiffs, Juson & Co., required the defendant to deliver their goods on board of a schooner called the *Provence*, which they had hired for that purpose, and the defendant offered to accede to their request provided the freight were first paid.

The plaintiffs, however, refused to pay the freight until the goods should have been actually delivered on board the *Provence*; and thereupon the defendant landed the goods upon a wharf, at which goods, such as those forming the cargo of the *China*, are usually landed.

The plaintiffs being of opinion that they had a right, without previous payment of the freight, to insist upon their goods being placed on board of the *Provence*, had no person in attendance, on the wharf, to receive their goods when they were delivered there; nor did they look after them in any way until some days after they had been landed; when the plaintiffs fearing the total loss of their goods took possession of them.

The evidence establishes that in the interval between the time at which the goods were landed, and the time at which they were taken possession of by the plaintiffs, a portion of them was lost, and a further portion injured by the inclemency of the weather. And it is also established that the plaintiffs were subjected to additional expenses to a considerable extent by the delivery on a wharf instead of into a lighter as required.

The principal question which this case brings under our consideration is: whether a consignee of goods on board ship, can insist upon his goods being delivered *upon another vessel, before* the payment of the freight due to the carrier required to make such delivery.

That a common carrier has a right to retain possession of goods carried by him until payment of his freight, cannot be doubted, and indeed, is not denied ; but it is said that even if the defendant had delivered the goods in question, as was requested, he would have had a right to detain the schooner containing them until the freight was paid, and reference has been made to the case of *Sodergreen vs. Flight*, in which " the captain of a ship was allowed a " lien on a part of a cargo which had been removed into a " lighter sent by the vendee along side of the ship, but " which the captain afterwards fastened to the ship's side, " to prevent its final removal." (1)

It is not necessary to decide, in this case, whether, under our law, the defendant, as master of the *China*, in consequence of a difficulty between himself and the plaintiffs, would have had a right of *his own authority*, to detain a vessel belonging to a third party. Even if it be assumed for the sake of argument, that the defendant would have had a right to detain the schooner upon which the plaintiffs wished their goods to be delivered, until the freight due upon them was paid, still, it must be admitted that if the defendant had had occasion to enforce his right of lien, the cost and difficulty incident to the exercise of that right, would have been very greatly increased by the fact of the goods having been placed upon a vessel belonging to a third party.

According to this view, the plaintiffs required the defendant to do an act tending to impair materially his lien for the freight due to him ; and, as the plaintiffs had no greater right to ask the defendant to impair his lien, than to defeat it altogether, I think the defendant was justified in refusing to accede to the request of the plaintiffs.

In making the foregoing remarks, I have considered the question to be decided mainly with reference to the rights

(1) *Sodergreen vs. Flight*, cited in *Hanson vs. Meyer*, 6 East, 614 : —Angell, *Com. Carrier*, No. 37A.

of the defendants; but I think the same result would be arrived at, if the case were considered more particularly with reference to the rights of the plaintiffs. They had a right to have possession of their goods *after* payment of the freight due. Whereas if their demand had been acceded to, that is if the defendant had delivered the goods on board the *schooner, provided by the plaintiffs*, without pre-payment of the freight, the plaintiffs would have had possession of the goods *before* paying the freight. In a word, the plaintiffs would have had, in their own possession, their own goods, and the freight due upon them to the defendant, and to this possession *both of the goods, and the freight, at one and the same time*, they were not entitled.

If this view of the case be correct, that is to say, if the plaintiffs had not a right to demand delivery of their goods on board their lighter, before paying the freight due, then, there is nothing to exclude this case from the operation of the general rule which obtains in England and in the United States, and which has been invariably acted upon in this country, that the landing of goods, on the usual wharf, after due notice, is a good delivery. If the present case comes within that rule, then as the defendant acted in conformity with it, I do not think that he can be liable, either for the extra expenses to which the plaintiffs were subjected, in consequence of their goods having been landed on a wharf, or for the damages done to the goods, in consequence of the plaintiffs having failed to look after them for some days.

Authorities have been cited as establishing "that if the consignee is unable to receive or refuses to receive the goods, the carrier is not at liberty to leave them on the wharf; but it is his duty to take care of them for the owner." (1)

There are many cases in which I would think it the duty of the Court to act upon the above doctrine; but where the

(1) Story on Bailments, No. 545.

owner having received due notice, is aware that his goods are being landed, and wilfully refuses to take charge of them ; it seems to me impossible that he can be allowed to make any other party liable for damages done *to his own goods*, in consequence of *his own wilful neglect*.

For these reasons, I am of opinion that the action of the plaintiffs ought to have been dismissed ; and that the judgment of the Superior Court must be modified accordingly ; and, I have the less hesitation in adopting this course, as the proposed judgment, which I believe is such as the rules of law dictate, is in accordance with the well established usage of trade at Quebec, as proved by the weight of evidence in this cause.

To prevent misapprehension I may add, that the present judgment, at least so far as I am concerned, is not to be understood as deciding that consignees *in all cases* may demand a delivery of their goods into a lighter, on condition of paying the freight in advance.

M. James Gillespie, who has been extensively engaged in trade at Quebec for the last thirty years, says :

“ It would be impossible for a vessel, having a general cargo, and where there are a large number of consignees, “ to deliver their goods to the several consignees in lighters, “ without entailing very great delay upon the ship.” This opinion which is in accordance with that of several other witnesses, fully competent to speak on the subject, seems to me to be reasonable. But in cases where from the nature of the cargo, or from the small number of the consignees, it would not be more troublesome or expensive for the master to deliver his cargo into a lighter, than on a wharf, it would seem reasonable, that upon payment of the freight due, the consignee should have, as the plaintiffs in the Court below contended, a right to demand that their goods be discharged, either from one side of the ship, upon a wharf, or from the other side, into a lighter, at their option.

On these points, as they do not present themselves in this cause, I express no positive opinion ; and I now allude to them merely to prevent wrong inferences from the present judgment.

The Court, &c.—“ Considering that the said Thomas Aylward, the defendant in the Court below, had a lien on the goods mentioned in the pleadings filed in this cause, belonging to the said R. Juson and Co., the plaintiffs in the court below, for the sum of \$601.77 due to him, the said Thomas Aylward, as freight for the carriage of the said goods on board the ship *China*, from Liverpool to Quebec : Considering that, if the said Thomas Aylward had delivered the said goods on board of a schooner belonging to a third party, as required by the said R. Juson and Co., the enforcement of the said lien of the said Thomas Aylward on the said goods (if possible) would have been attended with much greater trouble and expense than if the goods had been delivered upon a public wharf, in the usual course of trade : Considering therefore that the said Thomas Aylward, was not bound to deliver the said goods on board of a schooner belonging to a third party, as required by the said R. Juson and Co., and that the said Thomas Aylward had a right to deliver the said goods as he did, upon a public wharf, in the usual course of trade, and that the said Thomas Aylward cannot be held liable for the expenses to which the said R. Juson and Co. were subjected in consequence of their said goods having been delivered on a public wharf, as aforesaid, nor for the damage caused to the said goods in consequence of the said R. Juson and Co. having wilfully allowed the same to remain on the said public wharf for several days exposed to the rain and bad weather.

Considering, therefore, that in the judgment of the Court below, in so far as it declares that the damage sustained by the said goods “ was caused by the default of the plaintiffs (to wit, the said R. Juson and Co.) to carry away the same, and not by any act of the defendant,” (to wit, the said

Thomas Aylward) there is no error ; but that the said judgment is erroneous in so far as it condemns the said Thomas Aylward to pay a sum of \$143.20, for the expense of the said wharfage, additional freight and labour, to which, it is alleged the said R. Juson and Co. were subjected on account of the delivery of the said goods on a wharf, as aforesaid, doth in consequence confirm the said judgment, to wit : the judgment of the Superior Court at Quebec, rendered on the 5th day of September, 1861, in so far as it dismisses the claim of the said Juson and Co., against the said Thomas Aylward, for the said damages, and doth reverse the said judgment, in so far as it condemns the said Thomas Aylward to pay to the said R. Juson and Co., the said sum of \$143.20, with interest and costs ; and proceeding to render such judgment as the Court below ought to have rendered, as regards that part of the demand of the said R. Juson and Co., in relation to which the said judgment of the Court is hereby reversed, doth declare the tender made by the said Thomas Aylward of ten dollars as the value of seven bars of iron which he failed to deliver to the said R. Juson and Co., good and sufficient ; seeing that the said sum of ten dollars, deposited by the said Thomas Aylward, together with thirteen shillings and seven pence, deposited as costs, hath been received by the said R. Juson and Co., doth condemn the said R. Juson and Co., the plaintiffs in the Court below, to wit : Richard Juson and Edward Irvine Furguson, jointly and severally, to pay to the said Thomas Aylward, his costs in the Court below, incurred subsequently to the filing of his pleas therein ; and doth also condemn the said Richard Juson and Edward Irvine Furguson, plaintiffs in the Court below, jointly and severally, to pay to the said Thomas Aylward all his costs in this Court, as well upon the appeal of them the said R. Juson and Co., as upon the appeal of him the said Thomas Aylward, &c., &c.

HOLT and IRVINE, for Juson and Co.

JONES and HEARN, for Aylward.

CIRCUIT COURT.—SHERBROOKE.

Before :—SHORT, Justice.

No. 757. { MORKILL,..... Plaintiff.
 { vs.
 { JACKSON,..... Defendant.

Held :—That the husband, where legal community exists, is not liable for debts incurred by the wife in the maintenance of a separate establishment from her husband, if she has voluntarily left his domicile without legal cause.

Jugé :—Que le mari, dans le cas de communauté légale, n'est pas responsable des dettes contractées par la femme pour le maintien d'un établissement séparé de celui de son mari, si elle s'est volontairement absentée de son domicile sans cause légale.

Judgment rendered the 12th March, 1863.

This was an action of assumpsit for goods sold and delivered. It was founded upon an ordinary trader's account, and the action was brought in the usual way, as if there were no exceptional circumstances. The defendant's plea was that the defendant had never purchased the goods, that his wife might have done so, but of this he was ignorant; that his wife had not lived with him for twenty years, and more, and that she left him without any cause, and against his will; that he had always provided a home for her and enough for his household; that these facts were all well known to the plaintiff, and if he sold her goods it was on her credit, not on the credit of the defendant.

The plaintiff answered to this that there was no legal separation of property between the defendant and his wife; that a *communauté* existed between them, and that the defendant as *maître de la communauté* was liable for the debts of the *ménage*; that the goods furnished were ordinary household supplies for persons in their station in life. The plaintiff proved the sale and delivery of the goods to the defendant's wife, and the prices, and that the goods were such as persons in the defendant's station in life were wont to have, and rested his case there. The defendant proved the material allegations in his plea; that his wife left his

house against his urgent request for her to remain ; that he had always been ready to receive her back ; that he provided amply at his own domicile for his household ; that his wife by means of her own property, with which he had not meddled, had kept up an establishment, some twenty miles from the defendant's, and the plaintiff as well as other traders had furnished her what she required in goods, and gave her credit *ad libitum*, never charging the goods to the defendant, or receiving any recognition of their accounts from him in any way. That it was only when her supplies ran low from certain causes, that an attempt was made to attach liability to the defendant.

It was proved by the plaintiff, in rebuttal, that the defendant had never made any allowance to his wife for her support separate from him, and that he consented to the separation so far, and so far only, as not to resist it by the legal remedies open to him ; not approving of it, and refusing to do any thing that might be construed as an approval on his part. It was also proved that he had refused to give his authorization for the sale of his wife's real property, which she had frequently requested him to grant.

On behalf of the plaintiff it was contended that, by the fact of marriage in Lower Canada, the defendant had formed a partnership in the eye of the law with his wife, which existed unless legally dissolved, and so far as third parties were concerned, was unaffected by any mutual arrangement to live separately, "*cette convention fait présumer celle de mettre en commun leur mobilier, leurs revenus, les fruits de leurs épargnes et de leur commune collaboration.*" That whatever was furnished for the support of either of the *conjointes*, was *d'autant* a contribution to the *communauté*, and created, *ex lege*, an obligation on the part of the husband to pay for it. The only means of reaching the *communauté* was by action against the husband, and unless he was held liable to liquidate such debts, he was permitted to enrich himself at the expense of others. That the husband

must be considered as consenting to his wife's living apart from him, because the law afforded him means to constrain her to live with him, and therefore his wife did not lose her quality of agent for him as respected matters relating to the *ménage*. (1)

It was urged on behalf of the defendant that in the first place the wife could not contract validly without the authorization of her husband, and she could only bind her husband or charge the *communauté* for *aliments*, when in the apparent discharge of her conjugal duties. When living separately from him without judicial sanction, she must be presumed to be so living without sufficient cause of separation. Persons who granted credit to her, were warned by the fact of separation alone, that the husband did not accord his sanction to her contracts. Pothier implied this opinion when he spoke of the case of a wife committed to prison by a creditor. "Lorsque le créancier a fait constituer prisonnière la femme pour la réparation civile en laquelle il l'a fait condamner, est-il fondé à répéter du mari, durant le mariage, les sommes qu'il paie pour les aliments de la femme, pendant le temps qu'il la retient en prison? Les moyens du créancier sont, que la communauté doit à la femme des aliments; le créancier a donc acquitté une dette de la communauté en les lui fournissant; et par conséquent il pourrait paraître fondé à s'en faire rembourser par le mari, chef de la communauté qui était débitrice des dits aliments, et à la charge de laquelle il les a fournis. Les moyens du mari, pour se défendre de cette demande, sont que la communauté n'a pas profité des aliments que le créancier a fournis à la femme qu'il retient prisonnière; *que ceux qui auraient été fournis à la femme en la maison de son mari qui est le lieu où ils lui sont dus, n'auraient rien coûté à la communauté, qui en aurait été dédommagée par les services que la femme aurait rendus à la maison.*" The domicile

(1) Plaintiff's authorities :

Pothier, Traité de la Puissance du Mari, No. 82 :—Pothier, Traité de la Communauté, Art. 1, No. 2 :—Idem, Art. 2, partie 1, No. 514 :—Addison on Contracts, pp. 212 and 213.

of the *communauté* is the husband's residence, his home, and it is upon this principle that the *meubles* in and about his domicile are presumed to belong to him as *chef de la maison*. No such presumption could exist when goods were in the possession of the wife elsewhere. By a parity of reasoning the wife who by her own caprice, sets up for herself a residence at a distance from her husband, manned with a corps of domestics, could not for the purchase of supplies at this establishment be considered her husband's *mandataire*. This was not *le ménage*, for which the husband was to provide. Toullier in extolling this exceptional provision of law, whereby the wife is made the *mandataire* of the husband, "relativement aux achats de comestibles et des autres provisions ordinaires de la maison, aux médicaments et vêtements de sa famille, aux emplettes des ustensiles et meubles nécessaires au ménage." says: "Cette exception est fondée sur l'ordre que la nature même semble avoir établi pour le gouvernement de la famille, et dans le partage naturel de l'administration des affaires domestiques: le mari est chargé des affaires du dehors, la femme de celles du dedans, des détails et de l'économie du ménage, de pourvoir à tout ce qu'exigent les besoins de chaque jour." The *ménage* here intended was evidently the husband's and wife's home, where they dwelt together, where were their *lares et penates*, and where each was acting in his and her sphere contemplated by the marriage contract and conjugal relation. The question involved in the cause is discussed at length in a case reported in the *Nouveau Denisart*, under the title "Autorisation," where the *duc de Lorges* was sued for 30,000 livres for debts paid to divers parties who had furnished supplies for the *duchesse de Lorges*, while living in voluntary separation from her husband, and keeping up a separate establishment. It was admitted that the *duchesse de Lorges* was furnished by her husband with an annual stipend, but it was alleged that these supplies were in excess of what the allowance was sufficient to meet. It was decided in appeal that the husband was not liable

under such circumstances for debts so contracted without his authorization. It was contended by the plaintiff that no allowance was made by the defendant to his wife for her support. The obligation on his part to make an allowance for his wife's permanent residence separate from him, while leaving his bed and house against his desire, is emphatically denied. If this were conceded, an evil disposed wife might ruin the best and most faithful of husbands by contracting debts for supporting customs and habits of life entirely disapproved of by him, and an establishment over which he had no control. He is said to be *chef de la communauté* and to have absolute administration of it. How could he exercise his dominion under such circumstances? It would be impossible. (1)

SHORT, Justice :—The defendant was married in 1839 ; prior to his marriage, his wife lived at her place called Beaumont, near Lennoxville. She went to Hatley and lived with her husband a short time after the marriage, and then returned to Beaumont where she lived as before her marriage for some 12 or 15 years, when her dwelling house was accidentally consumed by fire. After this she removed to Lennoxville where she has since lived and still lives in a house built by herself. During all this time for 20 years, and more, she has kept a separate establishment in every respect from her husband. The plaintiff, in common with other traders, dealt with her, from time to time making settlement with her, accepting checks from her which were paid, and credit was always given to her, the defendant's name was never in his books until shortly before this suit. She separated from her husband without any cause shewn or even alleged. Can the wife contract on her own behalf? The law of France merges the wife in her husband so that she can do nothing without his authority or sanction. If the contract is

(1) Authorities cited by defendant :
 Coutume de Paris, Art. 234 :—Pothier, *Traité de la Communauté*, 1 partie, chap. 2, No. 257 :—*Œuvres de Cochin*, vol. 3, p. 58 :—Nouveau Denisart, vbo. Autorisation, vol. 1, pp. 790, 791 :—Guyot, *Rep. vbo. Communauté*, vol. 4, p. 203 :—12 *Toul.* Rec., pp. 387-8, No. 261.

made without his authority, either expressed or implied, it will be void as well as respects her as him.

There are instances in which she may be considered as the agent of her husband, and in such cases her contracts are his.

In the management of the domestic affairs of the household, when living with her husband, the wife is the natural head, and unless she evidently transcends her husband's means or purchases articles altogether inconsistent with the position and circumstances of her husband, the husband must be responsible for her purchases. She in such case acts, and by law is presumed to act, as her husband's agent. Even this agency is not unlimited, the trader must use ordinary prudence in his credits; if the wife purchases goods unsuited to her husband's station, or with a degree of extravagance not consistent with his income, or contracts for things other than necessaries of the household, where the trader has been cautioned not to grant credit, such presumptive agency for her husband is negatived. This is the case where married persons reside together. The marriage contract is not unilateral. It creates mutual obligations and privileges. The husband is bound to provide for his household, but on the other hand the wife is bound to live with the husband unless he fails in his obligation to provide for her, or is a tyrant. She is neither to starve nor be a slave with him, but where there is no legal fault on his part, and there is simply a want of accord between them, she has no right to separate herself from him. If under those circumstances she does so, she forfeits her claim upon him for support, and ceases to have the character of his agent, as to providing for household wants. Public morality and public policy require this. Any other view would be most dangerous to society and unjust to individuals. The english law in this particular is not unlike ours. The liability of the husband for his wife's contracts is discussed at length

in Addison on Contracts, page 115, et seq., in the same sense as it is here enunciated. When the separation of the husband and wife is by mutual consent, the husband is bound still for her support, and if he makes no alimentary allowance for her, his credit may be pledged for her support in a limited way. In this case the defendant's wife left him without any cause which the law recognizes, and it has been clearly proved that the defendant made ample provision for his household *at home*, that he never desired her to leave, but declared to her that his doors were always open to her to return. She set up a separate establishment and has dealt in her own name, the plaintiff never gave credit to the defendant, but to her. She cannot be considered in this respect the defendant's agent.

The plaintiff's action must be dismissed.

RITCHIE and BORLASE, for plaintiff.

SANBORN and BROOKS, for defendant.

BANC DE LA REINE, } DISTRICT DE QUEBEC.
EN APPEL.

Présents: — AYLWIN, MEREDITH, BERTHELOT, BADGLEY
et GAUTHIER, Juges.

VALLÉE, *Appelant.*

et

PACAUD, *Intimé.*

Jugé :—Qu'il est loisible à un individu en possession d'un lot de terre dans un canton, *township*, depuis plus d'un et jour, de porter l'action en complainte et réintégrande contre une personne qui est entrée sur telle propriété seulement pour y couper du bois de chauffage; et que, dans pareil cas, il n'est pas nécessaire que l'action portée soit l'action simplement en dommage.

Held :—That an individual in possession of a lot of land in a township, for more than a year and a day, may bring an action *en complainte et réintégrande* against a person who enters upon such land merely for the purpose of cutting firewood thereon; and that, in such case, it is not necessary that the action brought should be simply an action in damages.

Jugement rendu le 19^{me} décembre, 1864.

L'intimé, depuis près de dix ans, était en possession publique et paisible d'un certain immeuble situé dans le

township de Somerset, comprenant le lot numéro vingt-huit et la moitié sud-ouest du lot numéro vingt-sept, dans le neuvième rang du dit township, lorsque l'appelant, dans le cours de l'hiver 1860, coupa et enleva de sur cette propriété une quantité de bois, causant par son trouble et ses voies de fait, ainsi qu'il était allégué, des dommages estimés à £60 ; se fondant sur cette possession d'au delà de l'an et jour, il intenta l'action en complainte devant la Cour Supérieure pour le district d'Arthabaska.

A cette action l'appelant répondit par une défense au fonds en fait ; sur l'issue ainsi jointe les parties procédèrent respectivement à faire leur preuve, et ayant été entendues aux mérites, le tribunal de première instance rendit le jugement suivant :

The Court, &c.—Considering that the plaintiff has proved by legal and sufficient evidence the material allegations of his declaration, and more particularly his possession of the lot of land described in his declaration, as therein alleged, doth maintain the said action, and it is hereby declared and adjudged that the said plaintiff has been by the said defendant troubled in his lawful possession of the said lot of land, and the said defendant is hereby forbidden to trouble hereafter the said plaintiff in his possession and enjoyment of the said lot of land ; and further, that the said defendant do desist from his said trouble and occupation of the said lot of land ; and it is further ordered that within three days from the service upon him of the present judgment, the defendant do deliver up and abandon to the said plaintiff the possession and enjoyment of the said lot of land, and the said plaintiff be put in possession thereof ; and further considering that the plaintiff has failed to establish that he has suffered any damage in consequence of his having been troubled in the possession of the said lot of land, the Court doth dismiss that part of the conclusions of the said plaintiff's declaration by which he prays for damages.

It was from this judgment that an appeal was instituted.

PARKIN, for appellant: The evidence adduced by the plaintiff, respondent, is insufficient to maintain the action *en complainte*.

It would appear from the evidence of the defence, that the possession, at the time of the alleged *trouble*, was in one Joseph Mackenzie, who produces titles, and who ran the lines and placed *bornes*, an act of possession much more unequivocal than any thing proved on the record with reference to the pretensions of the plaintiff.

The appellant, in good faith, with the permission of Mackenzie, through his agent, cut wood upon the lot in question. The insignificant nature of the supposed trespass is proved conclusively by the fact that the Court below refused to allow any damages, and dismissed that part of the plaintiff's conclusions.

It is clear that whether the pretensions of the respondent or of McKenzie, be or be not well founded, is a matter of indifference in this case. It was necessary for the plaintiff to make out a clear *possession annale*, which he has certainly failed to do.

Again; the acts of the defendant do not amount to a *trouble*. A *trouble* is something which attacks the possession of the presumed proprietor, and tends to disturb it to the extent of acquiring an adverse possession against him, or at least an inception of such possession, or an attempt to obtain it.

In this case it is manifest that the appellant, Vallée, merely entered on the land under his contract with M. McKenzie, to cut the wood which he had purchased, and not with any view to establish a possession, however momentary, in his own favor. He was a mere trespasser, and no conclusions could lie *en complainte* or *réintégrande* to compel him to desist from what he never did, or attempted to do, namely, to obtain a possession. The instances of *trouble*

given in the books, all relate to acts done with the intention of asserting a right to possession; and though the cutting of trees is given as an instance, it is mentioned with the view of showing an act of possession, and not as mere naked trespass, for which damages only can be claimed. In this case the very *contrary* to an attempt at taking possession appears, the defendant having merely cut firewood, with the permission of the supposed proprietor, and having, according to the judgment of the Court, which has been acquiesced in by the respondent, done no damage.

The appellant relies upon the fact that the respondent has not proved a *possession annale*, previous to the acts complained of; that the possession was rather in McKenzie, or at least a disputed possession, and that the acts committed by the appellant were not a *trouble*, but are proved to *have* been of a different character. In the absence of the contrary proof of the character of his acts amounting to an attempt to take possession of the land, those of the appellant might be presumed a trouble; but having shewn the contrary, he is entitled to the benefit of rebutting such presumption.

DUVAL, pour l'intimé.—La preuve de la possession de l'intimé est complète.

L'appelant a voulu, par sa preuve, détruire l'effet de celle faite par l'intimé en essayant d'établir que le lot n'était pas occupé, que c'était ce qu'on appelle un "*wild lot*," la Cour Inférieure en donnant gain de cause à l'intimé, a apprécié cette preuve comme lui étant suffisante.

L'intimé désire appeler l'attention de la Cour sur le fait important que l'appelant n'a point plaidé une possession contraire, ni essayé de justifier, en aucune manière, par ses plaidoyers, le trouble qu'il a ainsi causé à l'intimé. Il est bien vrai que l'appelant a produit quelques titres à l'enquête pour prouver qu'un certain M. McKenzie avait quelques droits à la propriété en question, mais l'intimé s'est

opposé à la production de ces titres et a fait motion pour les faire rejeter, et bien que la Cour Inférieure n'ait point voulu accorder cette motion, l'intimé soumet humblement que ces titres ne peuvent, en aucune manière, préjudicier aux droits acquis de l'intimé en vertu de sa possession. Si M. McKenzie a de fait quelques droits à la propriété, qu'il les fasse valoir par une action pétitoire, ce que probablement ni M. McKenzie ni ses représentants ne voudront jamais essayer de faire.

BERTHELOT, Juge.—L'intimé, demandeur en Cour de première instance, poursuivait l'appelant au possessoire comme ayant été troublé par ce dernier dans la possession et jouissance du lot de No. 28, et de la moitié sud-ouest du lot No. 27, au 9^{me} rang du Township de Somerset.

Il est allégué en la déclaration que l'intimé était en possession paisible depuis plus de 9 ans, jusqu'au 10 janvier, 1860 ; que le défendeur l'avait troublé à différentes reprises en entrant avec force et armes sur sa dite propriété, et en y coupant et enlevant différentes quantités de bois ; puis suit la conclusion ordinaire qu'il soit fait défense au défendeur de le troubler à l'avenir et condamné à lui payer £75 de dommages.

Le défendeur s'est contenté de plaider par une défense au fonds en fait qu'il n'était pas *coupable et endetté en la manière et forme mentionnées en la déclaration*. C'est un singulier plaidoyer à une action en complainte. Il aurait mieux convenu si l'action eut été pour dommages.

A l'enquête le demandeur a produit plusieurs exhibits. Celui sous le No. 4 est l'acte de vente du 22 décembre 1851, Cormier, notaire, qui lui a été consenti par J. Bte. Cyr, fils, de la moitié sud-ouest du dit lot No. 28. Ce dernier en était propriétaire pour l'avoir acquis de R. A. Young, suivant acte de vente du 10 août 1847, Pratte, notaire. R. A. Young était propriétaire de cette même moitié sud-ouest du lot No. 28, ainsi que de l'autre moitié, et du lot

No. 27, pour avoir acquis le tout par acte du 10 mai, 1847, Hossack, notaire, de Jacques Languedoc comme seul héritier de feu son père, Jacques Languedoc, qui paraît en avoir été le premier concessionnaire suivant lettres patentes datées du 21 avril, 1804.

Nous avons ainsi la preuve écrite que le demandeur avait un titre à la moitié sud-ouest du lot No. 28, et il serait difficile de lui nier le droit de porter son action au possessoire, quant à cette partie des immeubles dans la possession desquels il demande d'être maintenu. La difficulté git en ce que ne représentant pas de titre pour l'autre moitié du No. 28, et la moitié sud-ouest du No. 27, il se repose sur sa preuve testimoniale de possession pour obtenir les conclusions de son action, et prétend que l'on ne peut le traiter moins favorablement que s'il ne produisait de titre pour aucune partie des immeubles dont il réclame la possession.

Il maintient qu'en droit cette preuve est suffisante pour lui donner le droit de poursuivre au possessoire sans le secours de titres, et qu'en fait, dans la présente instance, il a suffisamment prouvé qu'il était depuis près de 9 ans en pleine possession des immeubles désignés dans sa déclaration pour devoir réussir.

Le défendeur prétend que les actes de déprédation qui lui sont imputés, ne peuvent pas justifier les conclusions de l'action, parce qu'ils ne peuvent être considérés comme des actes faits avec l'intention d'acquérir une possession contraire à celle des demandeurs. Sur la question de droit, l'on peut citer Pothier, Traité de la Possession, p. 524, No. 2. " La possession est un fait, plutôt qu'un droit dans la chose qu'on possède. Un usurpateur a véritablement la possession de la chose dont il s'est emparé injustement ; il est néanmoins évident qu'il n'a aucun droit dans cette chose.

No. 3. " Quoique la possession ne soit pas un droit dans la chose, elle donne néanmoins au possesseur plusieurs droits par rapport à la chose qu'il possède.

10. Elle l'en fait réputer propriétaire, tant que le véritable propriétaire ne se fait pas connaître et ne le réclame pas.

20. " La possession donne au possesseur des actions pour s'y faire maintenir, lorsqu'il y est troublé, ou pour se le faire restituer lorsqu'il en a été dépouillé.

" Ces deux effets de la possession sont communs à la possession qui procède d'un juste titre, et à celle qui est destituée de titre, à celle qui est de mauvaise foi, comme à celle qui est de bonne foi. "

No. 83. " Le possesseur, quel qu'il soit, doit aussi avoir une action pour être maintenu dans sa possession, lorsqu'il y est troublé par quelqu'un, et pour y être rétabli, lorsque quelqu'un l'en a dépossédé par violence.

No. 95. " Il n'importe aussi qu'il possède l'héritage justement ou injustement ; car dans l'action de complainte, il n'est pas question du droit de la possession ; il n'est question que du seul fait de la possession, p. 554.

Contre qui peut-on intenter la complainte, et pour quel trouble.

No. 102. " Il y a deux espèces de troubles pour lesquels on peut intenter la complainte ; le trouble *de fait* et le trouble *de droit*.

" On appelle trouble de fait, les différents faits par lesquels quelqu'un entreprend quelque chose sur un héritage dont je suis en possession, soit en le labourant, soit en coupant les fruits qui y sont pendants, soit en y *abattant* *quelqu'arbre*, ou en arrachant quelque haie, ou en comblant un fossé, ou en y en ouvrant un.

" Voie de fait se dit de tout acte par lequel on exerce, de son autorité privée, des prétentions ou des droits contraires aux droits ou aux prétentions d'autrui. "

“ Toutes les voies de fait qui rentrent dans l’une des quatre clauses qui suivent sont repréhensibles et réparables par provision.

1o. “ Dans les matières susceptibles de jugement possessoire, celui qui possède publiquement depuis les an et et jour derniers, étant aux yeux de la loi réputé propriétaire, jusqu’à ce qu’il soit publiquement déclaré usurpateur, quiconque le trouble ou le dépossède par voie de fait, sans nécessité, contrevient à une des règles fondamentales de l’ordre public, et il doit être condamné à restituer le possesseur, aux dommages et aux dépens. (1)

“ On distingue le trouble naturel, ou de fait, du trouble civil, ou de droit.

“ Trouble s’entend, dit Loisel, non-seulement par voie de fait, mais aussi par dénégation judiciaire.

“ Rodier, sur l’ordonnance de 1667, semble n’admettre qu’une espèce de trouble, celui de fait ; le véritable cas de la simple complainte, dit-il, c’est quand il y a quelque trouble de fait qui ne va pas pourtant à nous déposséder.

Et Garnier finit par dire, p. 66. “ Il faut remarquer que le trouble de fait proprement dit, ne consiste pas dans la dépossession, mais dans une entrave, une simple gêne apportée à la jouissance.

“ Dans notre droit ancien on a toujours pu, en cas de dépossession, choisir entre la complainte et la réintégration, mais non dans le cas de simple trouble, qui n’a jamais donné lieu qu’à la complainte ; telle est aussi la règle de notre droit nouveau. ” (2)

Les autorités ci-dessus me paraissent établir clairement trois choses.

1o. Qu’il importe peu que le possesseur soit de bonne foi ou de mauvaise foi, propriétaire ou usurpateur, il lui

(1) 17 Guyot, Répertoire, vho. Voie de Fait, p. 599.

(2) Garnier, Des actions possessoires, 1ère partie, ch. 3. art. 4, pp. 64, 65, 66. Des diverses espèces de troubles.

suffit d'être publiquement en possession depuis plus d'un an et un jour, pour pouvoir poursuivre en complainte.

20. Qu'il n'est pas nécessaire que celui qui lui fait un trouble de fait ait eu intention de le déposséder, mais que la voie de fait, le trouble naturel, suffit.

30. Que le défendeur n'ayant pas répondu par son plaidoyer qu'il était allé sur les terres en question comme autorisé du Sieur Mackenzie, qu'il en prétend propriétaire pour partie, par le titre qu'il n'a produit qu'à son enquête, ne peut réussir en suscitant indirectement et aussi tard une question de propriété qui ne pouvait être soulevée que par M. Mackenzie. Si ce dernier a des droits à la propriété dont M. Pacaud est en possession, ce sera le sujet d'un débat entre ces deux derniers par action au pétitoire, et ce ne peut aucunement préjuger la question, et ne peut être examiné dans la présente contestation.

Il suffit pour le demandeur intimé de prouver qu'il était en possession, et il me paraît l'avoir prouvé suffisamment pour le cas de terres incultes situées dans nos grandes forêts. Les actes de possession d'aussi grande étendue de terre ne peuvent être réglés par les mêmes principes que ceux qui règlent la possession de terres ou terrains fixes, certains, déterminés, ou d'emplacements mesurés et cadastrés tels qu'ils le sont en France, et c'est en vain que l'on citerait au soutien de la cause du défendeur, pour repousser la possession du demandeur, l'autorité tirée du Traité de la Prescription de Troplong, No. 255. " Un usurpateur ne " serait pas censé avoir possédé la chose qu'il prétend " avoir acquise par prescription s'il ne l'avait occupé pied " à pied, et d'une manière patente. "

Il n'y aurait jamais moyen d'établir la possession d'un lot de 200 ou 300 acres, s'il fallait astreindre le propriétaire ou le possesseur à une doctrine qui n'a d'application que pour des lots de moindres dimensions.

Deux témoins entendus au soutien de la demande, M. Cormier, notaire, et M. Poudrier, ont prouvé que M. Pacaud était réputé dans l'endroit en possession de ces propriétés, qu'il en payait les taxes municipales et les répartitions pour bâtisses d'Eglise. M. Cormier, agent de M. Pacaud, y a eu des animaux en paccage et y a fait des récoltes, et il prouve que M. Pacaud les avait publiquement et par affiches offertes en vente dès l'année 1855. Ce sont autant d'actes qui démontrent que la possession du demandeur était publique, et qu'elle s'étendait à toute et chaque partie des deux lots, et l'on ne peut exiger une preuve plus formelle en semblable cas. Il jouissait d'une partie par paccage et partie par culture, et s'annonçait publiquement comme propriétaire en possession du tout et l'offrait en vente, il y a un exhibit dans la cause qui est un avis de vente de ces terres et d'autres, lequel exhibit est prouvé par le témoin Cormier, l'agent de Pacaud, et il en payait les taxes municipales et répartitions.

Il a été décidé par la Cour d'Appel dans la cause de Bowman et Stuart, qu'en fait de terres incultes dans les townships, l'on ne pouvait s'attendre ni exiger une prise de possession aussi formelle et complète que pour des terres labourées, mesurées ou clôturées. (1)

Enfin pour répondre à la prétention de l'appelant lors de l'argument que les allégations de possession n'étaient pas suffisantes pour justifier les conclusions ; il me suffira de dire que dans la cause de Stuart vs. Langley, rapportée au 1er Vol. des Déc. du B.-C , p. 338. Il a été : " Jugé, que " le simple allégué de possession par le demandeur d'un " héritage, est suffisant pour soutenir une action de réinté- " grande, sans alléguer la possession annale : " Jugement le 29 avril, 1851, DAY, VANFELSON et MONDELET, Juges.

" The Court held the declaration as it stood to be sufficient. The term " possession " had a technical meaning :

(1) 3 Déc. des Tribunaux du B.-C. p. 309.

"it meant that kind of interest which would entitle a party to bring an action." (1)

Sur le tout je ne vois aucune difficulté à confirmer le jugement, et je pense que la Cour de première instance aurait pu accorder quelques dommages, mais elle en a été empêchée probablement par les frais considérables que le défendeur avait à payer, et a considéré que l'objet du demandeur était obtenu en faisant cesser les déprédations sur les lots dont il était en possession.

La majorité de la Cour est d'avis de confirmer, mais sans frais devant cette Cour, vu que l'intimé demandeur en Cour Supérieure aurait pu se pourvoir devant les Juges de Paix pour faire cesser les actes de déprédation dont il se plaint. Quant à moi, je pense que puisque la loi lui accordait l'un et l'autre recours, que ce n'est pas le cas de lui faire payer une partie des frais de l'appel interjeté contre lui, d'un jugement qui lui reconnaissait un droit, que la majorité de cette Cour lui reconnaît également.

Jugement: The Court &c:—Considering that in the rendering of the judgment of the Court below, there is no error: Doth confirm the said judgment, &c., but it is ordered that each party pay the costs by him incurred before this Court.

BERTHELOT, dissente, inasmuch as he is of opinion that the respondent ought to recover his costs in appeal.

PARKIN et PENTLAND, pour l'appelant.

DUVAL et TASCHEREAU, pour l'intimé.

(1) Pothier, Possession, Nos. 2 et 3 ci-dessus cités.

SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 1431. { CASPAR..... *Plaintiff*.
 vs.
 { HUNTER..... *Defendant*.

Held :—1o. That an action, for a *dette mobilière*, will not lie against a testamentary executor alone, but that the heirs or other personal representatives of the testator, must be joined in the suit, although the executor was directed, by the will, to pay the debts; and although the action was commenced within the year of the death of the testator.

2o. That the plea of the executor, "that he has no part of the estate of the testator in his hands," will be maintained, although the action be instituted within three months of the death of the testator.

Jugé :—1o. Qu'une action pour une dette mobilière ne peut être portée contre un exécuteur testamentaire seul, mais que les héritiers ou autres représentants du testateur, doivent être mis en cause, quoique l'exécuteur soit, par le testament, chargé de payer les dettes; et quoique l'action soit commencée dans l'an du décès du testateur.

2o. Que la défense de l'exécuteur, "qu'il n'a aucune partie de la succession du testateur entre ses mains," sera maintenue, quoique l'action soit portée dans les trois mois suivant le décès du testateur.

Judgment rendered the 31st December, 1863.

The plaintiff's action was instituted for the recovery of the sum of £170 2s. 4d, amount of a judgment rendered in Upper Canada, in his favor, against one Henry Smeaton, and was directed against the defendant in his quality of executor of the last will and testament of the said Smeaton. To this action the defendant pleaded by perpetual exception: That the late Henry Smeaton had by his will made on the 22 February, 1862, constituted his wife, Mary Templeton, his universal legatee, and had bequeathed to his children certain sums of money; that afterwards, on the 8th July, 1862, Smeaton had died, and that having been nominated executor under the will, he, the defendant, had accepted the office and had, on the 26th July, caused an inventory of the estate to be made, and, by notices in the public newspapers, had called in the creditors of the said Henry Smeaton to file their claims against his estate. That on the 1st of September, 1862, he, the defendant, had paid all the claims that were filed against the estate and the legacies mentioned in the

will, and had administered all the goods and chattels of the said Henry Smeaton, which had come into his hands to be administered.

That he, the defendant, had not at the time of the suing out of the writ, nor at any time since had he had, any goods or chattels which were the goods and chattels of the said Henry Smeaton in his hands to be administered, and concluded for the dismissal of the action.

The plaintiff demurred to this plea, on the ground that it was no answer to his action that the defendant had administered all the goods and chattels of the testator that had come into his hands to be administered ; and that even if it were true that he the defendant had administered all the goods and chattels he would not for that reason be entitled to demand the dismissal of the plaintiff's action, or prevent a judgment from being rendered against him in his quality of testamentary executor.

Upon this demurrer an *avant faire droit* was ordered.

It was established by the evidence that the defendant had, as set forth in his plea, completely divested himself of the moveable estate belonging to the succession.

ANDREWS, for plaintiff, argued that the real question before the Court was " whether within the year after the death of the testator, an action for the recovery of a *dette mobilière* due by him could be brought by the creditor against the testamentary executor charged by the will of the testator with the payment of his debts. "

In this case the action was instituted within the year ; the will directed that the debts should be paid immediately, and the legacies three months after the death of the testator ; the action was commenced within three months of his demise, yet previously thereto the executor had taken upon himself to pay legacies to the amount of \$8701.95, and when payment of the plaintiff's debt was demanded, he pleaded that he had nothing left in his hands, and on that account

asked the dismissal of the action. That this was not the time for considering whether the executor had any part of the estate in his hands, or whether the payment of the legacies had been fraudulently made, which questions might thereafter arise on the issuing of a *saisie-arrest* in the hands of the testamentary executor.

That the executor was by law seized of the testator's moveable estate for a year and a day for the accomplishment of the will. That in the present case the will of the testator had not been accomplished by the defendant, since some of the debts remained unpaid. That the jurisprudence of the Courts at Quebec, founded on that followed in France, had been uniform in maintaining suits if brought within the year of the demise of the testator against executors for *dettes mobilières*, where they had been by the will charged with the payment of them, and that the decisions of the late Court of King's Bench, and of the Judges of the Superior Court, had always been in favor of such actions, even where it was expressly pleaded by demurrer that no action lay against the executor alone, the Courts holding that it was the duty of the executor to call in the heir, or other representatives of the decedent, if he deemed it advisable, whereas in this case no such pretension had been set up by plea, but, on the contrary, the defendant, instead of pleading that the action did not lie against him alone, or of taking proceedings to bring in the heirs, had taken upon himself to enter into a contestation with the plaintiff as to the existence of the debt itself. That for this reason the defendant should not only be condemned in his quality of executor to pay the plaintiff the amount due him, but should be personally condemned in costs.

CAMPBELL, for the defendant, answered that the testamentary executor could not be sued alone, but that the heirs or other representatives of the testator should be joined with him as defendants, inasmuch as he, the executor, could have no personal knowledge of, or interest in, the plaintiff's claim, that by his *défense au fonds en fait* he had denied

every allegation of the plaintiff's demand, and unless the plaintiff could show, that, by law, he, in his quality of executor, was alone liable to be sued for debts due by the estate, he must fail in his action. He would refer the Court to authorities which conclusively established the fact that the defendant, as testamentary executor, could not be sued alone. (1)

He further maintained, that even supposing that by law an action could lie against the testamentary executor alone, still that the present action must be dismissed, as the defendant was not personally liable, but only as the executor of the estate, and as it was established by the evidence that the defendant had not any of the property of the estate in his possession at the time of the institution of the action.

Judgment : La Cour, &c.—Considérant que les créanciers d'un défunt n'ont pas d'action purement et simplement contre l'exécuteur testamentaire du dit défunt pour le recouvrement de leurs dettes, et que pour le moins l'action qui serait dirigée contre le dit exécuteur testamentaire, devrait l'être simultanément contre l'héritier : Considérant que dans la présente cause, l'action n'est dirigée que contre l'exécuteur testamentaire de feu Henry Smeaton, et qu'il n'a pas qualité légale pour défendre à la dite action, au moins sans la présence et coopération des héritiers du dit Henry Smeaton : Considérant que de plus le dit défendeur avait, lors de l'institution de l'action en cette cause, exécuté le testament du dit Henry Smeaton, avait payé tous les legs qu'il était chargé de payer, et s'était dessaisi de tous les biens meubles de la succession du dit testateur ; la Cour maintient la défense au fonds en fait, et l'exception peremptoire en droit perpétuelle du dit défendeur, à l'action du demandeur, renvoie la réponse en droit du demandeur à l'exception du défendeur, et renvoie l'action avec dépens.

ANDREWS and ANDREWS, for plaintiff.

CAMPBELL and GIBSON, for defendant.

(1) Nouveau Denisart, vbo. Exécuteur §16, in fine :—2 Pigeau, Proc. Civ. p. 508.
"Les créanciers n'ont pas d'action directe contre lui, mais seulement contre les représentants universels du défunt."

COUR SUPERIEURE.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 153. { GUY..... Demanderesse.
vs.
GOUDREAU..... Défenderesse.

Jugé :—Qu'une action pour la simple récision d'un bail, sans aucune demande pour arrérages de loyers, ou pour dommages, peut être portée en vertu de l'acte des locateurs et locataires ; et que la juridiction de la Cour sera déterminée par le montant du loyer annuel des lieux,

Held :—That an action for the rescission of a lease only, without any demand for arrears of rent, or for damages, may be brought under the lessors and lessees act ; and that the jurisdiction of the Court will be determined by the amount of the annual rent of the premises.

Jugement rendu le 11 février, 1864.

L'action de la demanderesse était pour faire rescinder et annuler un bail par elle fait et passé en faveur de la défenderesse, parceque la défenderesse employait les lieux loués à des fins illégales, et tenait maison déréglée et de débauche, et qu'elle causait constamment des scandales publics, et ce contrairement aux vœux de la demanderesse, et contre son gré et volonté, et malgré ses défenses réitérées.

La défenderesse rencontra cette action par une exception déclinatoire, alléguant que l'action avait été intentée sous les dispositions du Stat. Ref. du B.-C., Ch. 40, intitulé : " Acte concernant les Locateurs et Locataires, " et sous l'amendement du dit acte, et que la Cour Supérieure n'avait pas juridiction dans la cause.

PLAMONDON, pour la défenderesse. L'action est portée sous les dispositions du Ch. 40, des Stat. Ref. du B.-C., et l'amendement de cet acte, 25 Vict., cap. 12. D'après la 4e section du statut premièrement cité, la juridiction de la Cour est déterminée par la valeur annuelle de la propriété louée, mais par la 25 Vict., Ch. 12, la juridiction est déterminée par le montant du loyer ou des dommages demandés par l'action, et non pas, comme auparavant, par la valeur annuelle du loyer. Or, dans cette cause, la deman-

deresse ne demande ni loyers, ni dommages, mais se borne simplement à demander la rescision et l'annulation du bail par elle consenti en faveur de la défenderesse ; sa demande ne contient aucune réclamation pour loyers ou pour dommages, et sans une telle réclamation la Cour n'a pas de juridiction, et l'action de la demanderesse aurait dû être portée d'après le droit commun.

MALOUIN, pour la demanderesse : Le but de la loi des locateurs et locataires est de faciliter le recouvrement de la possession de l'immeuble loué, et cet objet ne serait pas atteint si la prétention de la défenderesse était maintenue. La sous-sec. 3 de la 1^{ère} sec. du chap. 40, des Stat. Ref. du B.-C., déclare que le bail sera rescindé quand le locataire emploie les lieux loués à des fins illégales, et la sous-section 6 de la même section permet de joindre à l'action en résiliation une demande pour arrérages de loyer ; mais je ne vois pas qu'il soit nécessaire, pour réussir dans l'action en résiliation d'y joindre une demande pour loyers, d'ailleurs il n'est pas vraisemblable que l'amendement fait au chap. 40 des Stat. Ref. du B.-C., ait pour but de faire dépendre l'action en résiliation de la demande d'arrérages de loyer, surtout lorsque le locateur se plaint que les lieux loués sont employés pour des fins illégales. D'après le droit commun, nul doute que la demanderesse avait le droit de porter son action devant la Cour Supérieure, puisque le loyer annuel de l'immeuble en question est de £183, et la demanderesse ayant intentée son action devant la Cour Supérieure dont les Juges ont, en vertu des Statuts cités, les mêmes pouvoirs en vacance qu'en terme, le tribunal auquel son action est soumise a donc juridiction.

TASCHEREAU, Juge.—Si l'acte 25 Vict., ch. 12, n'eut pas été passé, nul doute que cette action eut dû être portée devant la Cour Supérieure, conformément au Stat. Ref. du Bas.-C., cap. 40, sec. 4, qui dit que le montant annuel du loyer déterminera la juridiction de la Cour ; mais cette clause a été amendée par l'acte ci-dessus premièrement

cité, de manière à être lue : " Les actions en vertu
 " du présent acte seront intentées dans la Cour Supé-
 " rieure ou de Circuit pour le montant du loyer ou des
 " dommages réclamés, et les frais seront alloués et taxés
 " suivant le montant du jugement." Cet acte, 25 Vict,
 cap. 12, détruit-il complètement la sec. 4 du Ch. 40 des
 Stat. Ref. du B.-C., ou ne fait-il que l'amender pour cette
 classe d'action où l'on demande la résiliation, en même
 temps que l'on fait valoir une réclamation pour arrérages de
 loyer, ou seulement une réclamation pour loyers ou dom-
 mages sans qu'il affecte les causes où l'on ne demanderait
 que la résiliation du bail, sans arrérages de loyers et sans
 dommages. De quelque manière que l'on décide ces ques-
 tions, je crois que le même résultat quant à la présente
 cause devra avoir lieu. En effet, si l'acte d'amendement
 n'a d'effet que pour les causes ci-dessus prévues, nul doute
 que conformément à la clause 4, du cap. 40, Stat. Ref. du
 Bas-Canada, l'action doit être portée devant la Cour Su-
 périeure, vu que le loyer annuel est de plus £50. Si l'on
 décide que la clause 4, du cap. 40, Stat. Ref. du B.-C., est
 tellement amendée par la 25me Vict., cap. 12, qu'elle doive
 être considérée comme anéantie, on doit dire encore qu'en
 vertu de l'esprit de la loi, et du droit commun, l'action
 doit être portée devant la Cour Supérieure, vu le montant
 du bail dont on demande la résiliation. En effet, on peut
 considérer le présent cas comme un *casus omissus* dans
 l'acte d'amendement, qui ne mentionne que les actions
 dans lesquelles on réclame du loyer ou des dommages, et
 alors la juridiction générale conférée aux Juges de la
 Cour Supérieure, tant en terme qu'en vacance, par les
 clauses 5, 6, 7 du cap. 40, Stat. Ref. du B.-C., et par l'en-
 semble de ce chapitre, donne à ce Tribunal de la Cour Su-
 périeure juridiction dans une cause où la matière en litige
 excède £50.

Jugement: La Cour, &c.—Considérant que la Cour Supé-
 rieure a juridiction en la présente cause, aux termes et

suiuant l'esprit du chapitre 40 des Stat. Ref. du B.-C., et, qu'en autant, l'exception déclinatoire de la défenderesse est non fondée, renvoie la dite exception, &c.

LÉGARÉ et MALOUIN, pour la demanderesse.

PLAMONDON et GUILBAULT, pour la défenderesse.

COURT DE CIRCUIT.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 602.	{	BILODEAU.....	Demandeur.
		vs.	
		MARTIN.....	Défendeur.
		et	
		MARTIN.....	Opposant.

Jugé :—1o. Qu'une opposition de la nature d'une requête-civile ne peut être considérée comme telle, si elle n'est pas ainsi appelée, et si l'opposant n'observe pas les formalités qui sont particulières à la requête-civile, et que le mot requête-civile est sacramentel dans telle procédure.

Held :—1o. That an opposition in the nature of a *requête-civile* cannot be considered as such, if it be not so called, and if the opposant does not observe the formalities which are peculiar to the *requête-civile*, and that the word *requête-civile* is absolutely necessary in such proceeding.

Jugement rendu le 21 janvier, 1864.

Le 14 novembre, 1863, un jugement fut rendu par le Greffier de la Cour condamnant le défendeur par défaut à payer au demandeur le montant de l'action.

Le défendeur produisit une *opposition à jugement* alléguant que le jugement rendu contre lui par le Greffier de la Cour avait été obtenu par le demandeur, par fraude, dol et surprise ; que lui le défendeur avait une bonne défense contre la demande du demandeur ; et il demandait permission de la produire. Le demandeur fit motion pour renvoyer cette opposition, attendu que l'opposant ne s'était pas conformé à la loi (1) qui veut que le défendeur, afin qu'il lui

(1) Stat. Ref. du B.-C., Ch. 83, sec. 117.

soit permis de produire une opposition à un jugement rendu contre lui par défaut et en vacance, dépose entre les mains du Greffier une certaine somme, suffisante pour payer les frais encourus par le demandeur.

Il était prétendu de la part du défendeur que l'opposition qu'il avait produite, était une opposition de la nature d'une requête-civile, et qu'il n'était pas obligé de déposer aucune somme d'argent, ni de suivre aucune formalité autre que celles qu'il avait suivies.

TASCHEREAU, Juge.—La question qui s'élève en cette cause est de savoir si l'opposition produite par le défendeur est une opposition à jugement, sujette aux conditions imposées par le Stat. Ref. du B.-C., Ch. 83, ou si elle peut être considérée comme une opposition de la nature d'une requête-civile ? J'avoue bien que cette opposition renferme les conclusions d'une requête-civile ; le procureur du défendeur a prétendu qu'elle était une requête-civile, mais il ne l'a pas ainsi appelée, et il n'a pas observé les formalités particulières à la requête-civile, et il faut décider maintenant, comme je l'ai déjà décidé dans plusieurs autres causes, que le mot requête-civile est, pour ainsi dire, sacramentel, et que l'on devait procéder sur icelle comme sur une requête-civile, ce qui n'a pas eu lieu. Cette opposition est donc tout simplement une opposition à jugement, et le statut exige que celui qui se plaint d'un jugement rendu par le protonotaire ou le Greffier de la Cour, dépose entre les mains du protonotaire ou Greffier un certain montant suffisant pour payer les frais encourus par le demandeur. Le défendeur n'a pas fait le dépôt nécessaire, et la motion du demandeur doit être accordée, et l'opposition renvoyée avec dépens.

PLAMONDON et GUILBAULT, pour le demandeur.

COLFER, pour l'opposant.

No. 162. { MAILLOUX..... *Demandeur.*
vs.
AUDET dit LAPOINTE.. *Défendeur.*
et
MAILLOUX..... *Opposant afin de conserver.*
et
CARRIER..... *Contestant l'opposition.*

Held :—That a promissory note, not yet due, endorsed by a party who has since become bankrupt, does not entitle the holder to be paid *au marc la livre* concurrently with the other creditors of the bankrupt, the term of payment not having expired.

Jugement rendu le 21 janvier, 1864.

Le 16e jour de septembre, 1863, Mailloux, le demandeur et opposant à la cause, par son opposition afin de conserver, demandait d'être colloqué pcur, entre autres, la somme de \$120.87, montant d'un certain billet promissoire fait et signé à Québec, le 29 août, 1863, par un nommé Audette, par lequel le dit Audette promettait, trois mois après la date du dit billet, payer à l'ordre du défendeur le susdit montant, lequel dit billet avait été subséquemment bien et dûment endossé et transporté au dit opposant. Il alléguait par son opposition que le défendeur était en faillite et déconfiture, et incapable de payer ses justes dettes. Carrier, autre opposant dans la cause, contesta cette partie de l'opposition de Mailloux, qui avait rapport au billet en question, parce que lorsque le billet avait été fait, signé et endossé, le défendeur était, et avait été, depuis plus de six mois, insolvable, en faillite et déconfiture, et parce que lui, Carrier, était bien alors et depuis plus de six mois, créancier du défendeur pour bonne et valable considération.

A cette contestation, Mailloux répondit spécialement ;

que le billet mentionné dans la partie de son opposition contestée par Carrier, et portant date le 29 août, 1863, avait été donné en remplacement et renouvellement d'un autre billet fait et endossé par les mêmes parties en faveur de lui le demandeur et opposant, dans le courant du mois de février alors dernier, lequel billet originaire avait été détruit ou déchiré lors du renouvellement d'icelui, tel que susdit, et qu'en conséquence il ne pouvait le produire ; que lors de la confection du billet dans le mois de février alors dernier, le défendeur n'était pas en déconfiture, ni insolvable, mais que le billet avait été fait, endossé et donné par les parties à icelui, et reçu par lui, Mailloux, de bonne foi, et dans le cours ordinaire de transactions commerciales.

Jugement : The Court, &c.—Considering that in so far as the promissory note mentioned in the opposition of Mailloux, dated 29th August, 1863, at the Parish of St. Gervais, whereby one Pierre Audette, three months after date, promised to pay to the order of the defendant \$120.87, is concerned, the said note at the time of the filing of the opposition had not matured ; and considering that the defendant was only to become liable to pay the amount mentioned in the said note upon two contingencies, neither of which had then occurred, namely that the said P. Audette should fail to pay his said note, and that the said defendant should be notified in due time of the default to pay of the said P. Audette ; Considering that there was no right of action in the plaintiff upon the said note at the time of filing the said opposition : The perpetual exception of Carrier is hereby maintained, and the opposition of the plaintiff, in so far as the last mentioned note is concerned, is hereby dismissed, with costs.

Bossé et Bossé, pour l'opposant Mailloux.

CASALT, LANGLOIS et ANGERS, pour Carrier contestant l'opposition de Mailloux.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

- No. 1701. { *Exparte* CHRYSLER
in
SIMARD vs. CHRYSLER,
and
No. 1703. { *Exparte* CHRYSLER
in
THE CORPORATION OF PILOTS vs. CHRYSLER.

Held:—10. That the master of every vessel leaving the port of Quebec, for any port out of this Province, or arriving in the port of Quebec, from any port out of the Province, is bound to receive on board a Branch Pilot, and to give him charge of his vessel while within the pilotage limits.

20. That a Branch Pilot is not entitled to receive charge of a vessel arriving within the port of Quebec, unless he shall have shewn, by signal or otherwise, his intention to board the vessel and take charge thereof.

Jugé :—Que le capitaine de tout vaisseau laissant le port de Québec, pour un port en dehors de cette Province, ou arrivant dans le port de Québec, d'aucun port en dehors de la Province, est tenu de recevoir à son bord un pilote licencié, et de lui remettre la charge de son vaisseau pendant qu'il est dans les limites prescrites.

20. Qu'un pilote licencié n'a pas droit de recevoir la charge d'un vaisseau arrivant dans le port de Québec, à moins qu'il n'ait indiqué, par signal ou autrement, son intention de monter à bord tel vaisseau et d'en prendre charge.

Judgment rendered the 5th of February, 1864.

Chrysler, the petitioner in these two cases, was master of the steamer *Arabian*, a vessel plying between Quebec and ports in the Provinces of Nova Scotia and New Brunswick, and, as such, was condemned by the Trinity House of Quebec to pay to the Corporation of Pilots two certain penalties for having refused, when entering or leaving the port of Quebec, to allow a pilot to come on board of his vessel, or to take charge of her while within pilotage limits. It appeared from the evidence taken in these cases that the steamer *Arabian* was a coasting vessel plying between Quebec and Shediac, in the Province of New Brunswick, and intermediate ports, but clearing from Quebec, for the port of Gaspé in this Province, and arriving in the port of Quebec, having previously cleared from Gaspé for this port; that she did not clear in Quebec, for any port out of the Province, and did not arrive in Quebec, under clearance from any foreign port, although she had on the occa-

sions in question passengers both for and from Shediac, a port without the limits of this Province.

To the informations and complaints of the Corporation of Pilots, Chrysler had pleaded that he was not liable or bound to take a pilot on board.

At the argument of the cases before the Superior Court, it was claimed, on behalf of Chrysler, that his vessel was a coasting vessel sailing from one port in Canada to another, under clearance from the Custom House, that no vessel was bound to take a Pilot on board, or to pay the pilotage dues, unless such vessel had taken a clearance for a port out of the Province, or was arriving in Quebec, under a clearance from some port out of this Province.

In answer, it was argued for the Corporation of Pilots, that although the *Arabian* had not cleared for any port out of this Province, still that she was on the route sailing between the port of Quebec, and a port out of this Province, and was therefore bound by law, to take a pilot on board and to pay the pilot dues.

STUART, Justice :—In these two cases the questions which arise are concerning the obligations of coasting vessels to take pilots on board, on leaving and arriving in the port of Quebec.

The law (1) says that the master of each vessel leaving the port of Quebec, for a port out of this province, shall take on board a branch pilot to conduct such vessel, under a penalty, &c ; and that the master of every vessel, coming from a port out of this province, and arriving in the port of Quebec, and not having a branch pilot on board, who shall perceive at a reasonable distance the boat or other small craft of a branch pilot carrying at the mast head the distinctive pilot flag, shall by lying to &c., facilitate the coming on board of such pilot, and shall give him charge of his vessel under a penalty, &c.

(1) 12 Vict. Cap. 114, secs. 53, 54 and 55.

It was argued on behalf of Chrysler that no vessel was bound to take a branch pilot on board, unless it had cleared from Quebec for some port out of the province ; (1) but the words of the 12 Vict., Cap. 114, are " leaving the port of Quebec ; " and although it is true that the *Arabian* had not cleared for any port out of this province, it is also proved that the vessel left this port for a port out of the province ; I am therefore of opinion that the first *certiorari*, No. 1701, must be disallowed.

But the second *certiorari*, No. 1703, must be maintained ; for although I am of opinion that every vessel coming into this port, from a port out of the province, is bound to receive a pilot on board, still the clause which imposes this duty on the master of such a vessel, with a view to increase the activity and usefulness of the pilot, imposes it under the condition that the pilot shall be in his boat, at a reasonable distance from the vessel, with a distinctive pilot flag flying at his mast head as a signal to indicate that he is on the watch for vessels to take them in charge and pilot them to Quebec.

On the occasion in question the pilot was not in his boat, had no pilot flag flying, and was not on the watch for vessels, he did not fulfil the conditions of the law, he came on board Chrysler's vessel at Rimouski as a passenger, and when the vessel had arrived within pilotage limits he demanded possession of her to pilot her to Quebec ; the master refused to give him possession of his vessel, and, under these circumstances, I am of opinion that he had a right so to refuse.

In the case, No. 1701, the judgment will be :

The Court, &c.—Considering that by law the master of each vessel leaving the port of Quebec for a port out of this Province, is obliged to take a branch pilot to conduct his

(1) 23 Vict. Cap. 123.)

vessel under a penalty, &c., and that the *Arabian* came under that provision of law, and that there is no error in the conviction complained of, doth set aside and annul the writ of *certiorari* in this cause issued, &c.

And in the case, No. 1703.

The Court, &c.,—Considering that by the 55th section of the 12th Vict., Cap. 114, the master of any vessel arriving within the port of Quebec, and not having a branch pilot on board, who shall perceive at a reasonable distance the boat or other small craft of a branch pilot, carrying at the mast head the distinctive pilot flag, shall facilitate the coming on board of such pilot, and shall give him charge of his vessel, under a penalty not exceeding £10, over and above the full pilotage, which shall be payable to such pilot as shall have shown by signal or otherwise his intention to board the vessel and take charge thereof: Considering that the complaint does not set forth that the master of the *Arabian* refused to give charge of his vessel, to any branch pilot who presented himself in the manner specified in this cause, but that the pilot who claims the pilotage entered into the vessel as a passenger, and as such passenger had no right, under the clause in question, to take charge of the vessel, and that he does not come within the object or meaning of this clause; and considering that there is error in the conviction complained of, doth quash, annul and set aside the said conviction, with costs, &c.

VANNOUVS, for petitioner.

CASALT, LANGLOIS and ANGERS, for the Corporation of Pilots.

BEFORE THE LORDS OF THE JUDICIAL COM-
MITTEE OF THE PRIVY COUNCIL.

Present :—LORD KINGSDOWN, SIR EDWARD RYAN and SIR
JOHN TAYLOR COLERIDGE.

BROWN..... *Appellant.*

and

GUGY..... *Respondent.*

Held :—1o. That obstructions to na-
vigable rivers are public nuisances, and
that no action by an individual lies for
such nuisance, unless such individual
suffers special and particular damage.

2o. That, in the case submitted, the ac-
tion en dénonciation de nouvel œuvre did not
lie, inasmuch as such action can only be
brought by a party claiming protection
against a work commenced, and still in
progress, by which, if completed, he al-
leges he will be injured. (1)

Jugé :—1o. Que les obstructions aux ri-
vières navigables sont incommodes publi-
ques, et qu'aucune action par un indi-
vidu ne peut être intentée en raison de
telles incommodes, à moins que tel indi-
vidu ne souffre quelque dommage spécial.

2o. Que, dans l'espèce, l'action en dé-
nonciation de nouvel œuvre ne compé-
tait pas, en autant que telle action ne
peut être intentée que par une personne
réclamant contre des travaux commencés,
et encore en progrès, par lesquels il al-
lègue qu'il souffrira dommage s'ils sont
complétés.

Judgment rendered the 15th February, 1864.

It appeared to their Lordships at the hearing of this
appeal that some of the points both of law and of fact so
elaborately argued at the Bar, were immaterial to the de-
cision of the only question which is open to them upon the
record. A further examination of the papers has confirmed
that opinion.

The appellant is the owner and occupier of a water-mill
on one side of the River Beauport. The respondent is the
owner of the domain of Beauport, on the other side of the
river.

In the month of October, 1852, the respondent erected a
wharf on land which he insists is part of his estate.

The appellant alleged that this wharf was injurious to
him; and on the 29th April, 1852, he commenced an action
against the respondent in the Superior Court of Lower
Canada, and on the same day filed his declaration.

(1) Vide report of this case in the Queen's Bench, Quebec,—11 L. C. Rep. p. 401.

After setting forth the appellant's title to the mill, and stating that he and his predecessors in title had for 100 years used the natural current of the river for working the machinery of the mill, the declaration contained the following allegations ; that the Beauport is a navigable river, and has, until the grievance hereinafter complained of, been used by the plaintiff and his predecessors in the floating of *bateaux* and other vessels employed by them in conveying grain, flour, and other effects to and from the said mill; that the defendant intending to injure the plaintiff in his business of a miller did, between the 16th day of October preceding, and the date of the issue of the summons (that is, the 29th October), erect lower down the river than the plaintiff's mill, and in and upon the said river Beauport, a certain wharf which nearly traverses the whole of the said river, and which materially alters the natural course of the river, and narrows the channel of the same so much that it is now impossible for the plaintiff to float *bateaux* or other vessels to the mill as he was used to do ; and that the defendant has further, by means of the said wharf, prevented the waters of the river from running down the natural channel, and compressed the channel to so small a breadth that whenever the waters of the river, from the freshets or otherwise, become higher, the said waters recede or are thrown back upon the plaintiff's mill, by reason whereof, and by means of the still water thereby occasioned, the mill cannot be worked, and that in consequence of the illegal and tortious acts of the defendant in erecting the said wharf, the plaintiff has been, and still is, prevented from using the waters of the river and working his mill as he otherwise would have done, to his damage of the sum of £300, currency.

The conclusions of the summons are :—

10. That the defendant may be decreed within eight days, or such other time as the Court may appoint, to demolish and remove the wharf, and that in default of his doing so,

the plaintiff may be authorized to do so at the defendant's expense.

20. That the defendant may be ordered to pay £300, currency, for the damage aforesaid, and costs. The whole without prejudice to any further damages that may be sustained by the plaintiff, by reason of the erection of the wharf.

The defendant in his answer denied generally the allegations of the plaintiff, and pleaded various special matters both of law and of fact to which it is not necessary to advert.

The cause being at issue, a great deal of evidence was produced on both sides, and in April, 1857, the Court referred it to three gentlemen as *experts* to make inquiry and report to the Court their opinion on several of the matters in dispute, with directions upon one particular point to receive further evidence. (1)

These gentlemen differed amongst themselves, two concurring in a report, and the other making a separate report; and after much expense and delay, finally the cause came on for hearing before the Superior Court—Mr. Justice Stuart being the Judge present, when the following order was pronounced :—

“ February, 1st 1860. ”

“ The Court having examined the proceedings of record, the evidence adduced, and heard the parties by Counsel on the merits; considering that the plaintiff hath failed to establish in evidence that the defendant hath erected, or caused to be erected, in and upon the river Beauport, a wharf which crosses the said river in any measure, or which obstructs or diverts the natural course of the same; considering that the river Beauport is alleged and proved to

(1) This order was given by Meredith, Morin, and Badgley, Justices.

be a navigable river, and that any obstruction to the same would be a public nuisance ; and considering that no action by an individual lies for a public nuisance, unless the party bringing such action has received special and particular damage therefrom ; considering that the said plaintiff hath failed to show in evidence that he has received any special or particular damage from the erection of the present wharf,—doth dismiss the present action, with costs.”

From this decision the plaintiff appealed to the Court of Queen’s Bench, and that Court by a majority of three Judges to two affirmed the Judgment, and from the decision of these two Courts the present appeal is brought to Her Majesty in Council. (1)

The only question on which it is our duty to advise Her Majesty is, whether the judgment dismissing the action ought to be reversed or varied ; in other words, whether the appellant at the hearing below established a case which entitled him, *secundum allegata et probata*, to any relief.

The action is founded on the allegation of damage caused to the plaintiff by a tortious act of the defendant. It complains both of injury already suffered before the commencement of the action, and of continuing injury, and seeks appropriate relief in respect of each complaint—compensation, in money, for the first ; and demolition of the wharf for the second.

The Courts below have found that the plaintiff has failed to prove any damage whatever sustained by him from the works of the defendant, either before the commencement of the action or subsequently.

Can we say that either of these findings is erroneous ?

(1) The majority was composed of Sir L. H. LaFontaine, Chief-Justice, Meredith, and Mondelet, Justices.

As to the first, its propriety was hardly disputed at our Bar, and, indeed, it did not admit of dispute.

As to the second, although there is a great deal of conflicting testimony, and much room for doubt, two Courts have come to a decision in favour of the defendant. The question is one upon which the Judges in the Colony are more competent to form an opinion than we can be ; and it is not the habit of their Lordships, in this Committee, to advise an alteration of a judgment, unless they can see clearly that, upon some point, there has been a miscarriage in the inferior Courts. This we are unable, in the present case, to discover. The observations of Mr. Justice Meredith show that he has examined the case with the utmost care and impartiality ; and the clearness and temper with which he expresses the conclusion at which he has arrived add great weight to his opinion.

It was said, however,—and this is the point relied on by the dissenting Judges,—that it was unnecessary for the plaintiff in the action to prove actual damage ; that the action might be maintained as one of *dénonciation de nouvel œuvre*, and that in such action it is sufficient to prove that the work complained of will, or probably may, be attended with injury to the plaintiff.

But the action of *dénonciation de nouvel œuvre* is of a different description from the present ; is founded upon a different state of circumstances ; and seeks different relief. In such an action, the plaintiff claims protection against a work commenced, and still in progress, by which, if completed, he alleges that he will be injured.

If such an action be brought it appears that the Judge may either interdict the further progress of the work or require security to be given by the defendant to the plaintiff against any injury which he may sustain ; but when the work is completed, this form of action is no longer competent.

This appears to have been the law of Rome. In the Dig., lib. xliii, tit. 15, "De Ripa munienda," after a statement that any protection to the banks of a public river must be made in such a manner as not to hinder navigation, so that any person who apprehends injury from the work may apply to the Prætor for an interdict to restrain it, and may obtain security, we find this passage :—"§ 5. Etenim curandum fuit ut eis ante opus factum caveretur. Nam post opus factum persequendi hoc interdicto nulla facultas superest etiam si quid damni postea datum fuerit, sed Lege Aquilia experiendum est."

The law and form of procedure of Rome seem in this respect to have been adopted into the law of France.

In Daviel, "Cours d'Eau," tit. "Du Domaine Public," par. 471, it is distinctly laid down that by the old French law, that is, by the law now prevailing in Lower Canada, the *dénonciation de nouvel œuvre* could only be maintained if instituted before the work was completed, though by an alteration introduced by the French Code, the law in this respect is now altered, and the action may be maintained in respect of a work either "fait ou commencé."

The author says :

"Je dis nouvel œuvre fait ou commencé. Sous l'ancienne jurisprudence, la dénonciation n'était plus recevable du moment que le nouvel œuvre était terminé ; c'est ce que cette action avait de spécial, comme aussi la faculté pour l'auteur du nouvel œuvre de continuer son travail en donnant caution, et la restriction du droit du Juge à suspendre les travaux sans pouvoir les faire détruire. Mais sous notre nouveau droit, la dénonciation de nouvel œuvre est assimilée aux autres actions possessoires, par cela que les lois n'ont pas reproduit les conditions particulières qui la caractérisaient autrefois."

In this case there is no doubt that the work was com-

pleted before the action was commenced, and the relief sought is different from that which, according to Daviel, could be granted in an action of *dénonciation de nouvel œuvre*. But even if the present suit could be regarded as an action of this description, it would be equally met by the objection that the plaintiff had failed to prove that the work would be injurious to him.

It was then said that, however the law might be, if the bank on the face of which this wharf is built were the private property of the defendant, a distinction is to be made, because the bank is, in truth, part of the bed of the river, and a portion of the public domain, and that a work erected upon it is a public nuisance of which any person interested has a right to complain.

That the bank in question is a part of the bed of the river, and a portion of the public domain, is not in terms alleged by the pleadings. The averment was said at the Bar to be contained inferentially in the statement that the wharf erected by the defendant nearly traverses the whole of the river, which it would not do unless the bank formed part of the river. If the fact were essential to our decision in this case, we should feel great difficulty in holding that the plaintiff had either sufficiently put it in issue by his declaration or established it by evidence.

But it is not in our opinion necessary to decide this question. The law of Lower Canada, as we collect it from the authorities, seems to stand thus :—

An officer suing on behalf of the public has a right at his own instance, or on the application of any person interested, to call for the demolition of any work erected without license on the public domain, and he is no more required to prove that the erection has occasioned actual damage to the public than a private person who complains of a wrongful invasion of his property is obliged to prove that it has occasioned actual damage to him. But although such

officer may, if he think proper, take proceedings to abate the nuisance, he is not obliged, nor is it in all cases his duty, to interfere. A case of this kind is put by Proudhon, in a passage cited by Mr. J. Aylwin. He says : " It may be that in the case of a dyke erected in the bed of a navigable river the dyke may do no injury to the actual state of the navigation, as being built in an arm of the river where navigation is not practised, and which nevertheless does not on that account cease to be a part of the public domain."

This supposed case has much resemblance to the present. The particular portion of the river where the channel is said to have been contracted does not appear to have been actually in use by the public for the purposes of navigation.

If the public officer refuse to interfere, an individual who suffers injury is not prejudiced ; he has still his *action privée*, by which he may recover damages for injury already sustained, and the abatement of the cause of such injury for the future. The public and private action are said to be not only independent of each other, but essentially distinct in their object. The fact that the place where the work is erected is public property, is of course very important in both cases, in regard to the right of the defendant to do what he has done, but it does not according to the law, as we can collect it from the authorities, supersede the necessity of the plaintiff in a private action proving that he has sustained injury by the work special to himself, and beyond that which is common to the public at large, and this, as we have already stated, the plaintiff in this case has failed to do.

Upon the whole, we must humbly advise Her Majesty to affirm the judgment, and the costs must follow the decision.

We cannot part with this case without noticing two subjects which have attracted our attention in the course of the

discussion, though they do not bear directly on the decision.

The first is the manner in which the case has been conducted in the Court below, and the enormous expense and delay which have attended the proceedings. Much of these evils is no doubt to be attributed to the parties, who seem to have been more anxious to indulge their feelings of hostility towards each other than to arrive at a cheap and speedy determination of their rights. But much must also be attributed to the unfortunate course adopted by the Court in directing the reference to *experts*—a step which appears to us to have been unnecessary and to have led to no satisfactory result, but rather interposed difficulties in the way of the decision, and to have occasioned crimination and recrimination amongst persons acting as officers of the Court, little creditable to the administration of justice.

The other subject to which we think it fit to advert is this: Two of the Judges have sent home long and very elaborate arguments, supported by a citation of numerous authorities, against the decision of the majority of the Court.

It was asserted by the respondent, without any contradiction on the part of the appellant, that these arguments were not delivered by the dissenting Judges at the hearing of the cause, but were first made known to the parties by being printed as part of the record before us. If the statement thus made be accurate, we must say, with all respect for those learned persons, that the course so pursued by them appears to us open to great objection. We think that their reasons for dissenting from their colleagues should have been stated publicly at the hearing below, and should not have been reserved to influence the decision in the Court of appeal.

We have thought it due to the general interests of the suitors in the colony to make these remarks, in order to

prevent what has been done from growing into a practice, though it may not have produced any mischief in this particular case.

SIR ROUNDELL PALMER, attorney general, and Mr. BOMPAS, for appellant.

GUGY, for respondent.

BANC DE REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—DUVAL, MEREDITH, MONDELET et BADGLEY,
Juges.

JOHNSON, *et al.*, *Appelants.*
et

ARCHAMBAULT, *Intimé.* (1)

Jugé :—Que, dans l'espace, en l'absence de preuve directe d'un titre particulier exclusif, une rue ou passage reconnu et ouvert pendant plus de trente ans, est censé propriété publique, quoiqu'aucun titre ou procès-verbal n'établisse que telle propriété soit propriété publique.

Held :—That, in the case submitted, in the absence of direct evidence of a particular title, a lane or passage recognised as such, and open during thirty years, and more, will be considered public property, although no title or *procès-verbal* establishes that it is such public property.

Jugement rendu le 9 mars, 1864.

Les faits de cette cause, ainsi que la décision de la Cour de première instance, sont rapportés au long dans le 12^e vol. des Décisions des Tribunaux, page 138, Johnson, *et al.*, vs. Archambault.

MONDELET, Juge.—Il me paraît qu'en l'absence de titre au terrain (rue Blacke) en question, il ne peut être regardé comme un terrain privé ou particulier. Il faut que ce terrain ait un caractère quelconque, il n'est et ne peut être amphibie. Je pense donc qu'il appartient à la ville, car la courte possession du défendeur (Archambault) n'a pu, évidemment, lui faire acquérir aucun droit à cet égard. D'ailleurs, dans les titres, et d'après ce que dit le défendeur

(1) Pour le rapport de cette cause en Cour de première instance, voir le 12^e vol. des Décisions des Tribunaux, p. 138, Johnson, *et al.*, vs. Archambault.

lui-même, cet espace de terrain a été connu et reconnu comme "rue Blacke" ou "Blacke Lane." L'ensemble de la preuve des demandeurs (appellants) établit les faits assez clairement pour justifier la conclusion que ce terrain n'est pas un terrain particulier. Dans ce cas-là, et vu l'usage qu'on en faisait comme sortie, avant que le défendeur eût bâti-là et clôturé, et la sortie et le passage de là, à la rue Lamontagne, je suis disposé à dire que les demandeurs sont en droit de se plaindre des bâtisses que le défendeur y a faites, et d'en demander la démolition. Bref, je suis d'avis que le jugement de la Cour de première instance, doit être infirmé :

La Cour concourant à l'unanimité dans l'opinion de M. le Juge Mondelet, rendit le jugement qui suit :

The Court, &c. :—Considering that the said street or lane called *rue Blacke*, mentioned and described in the declaration and pleadings in this cause filed, was a public street and thoroughfare on, and previous to, the 17th day of October, 1834, date of the title of acquisition by the said late James Henry Lambe, of his house and premises in the said declaration mentioned, and therein described as butted and bounded by the said street, and was used by him, the said James Henry Lambe, as such public street, and thoroughfare, and by his representatives the said appellants, plaintiffs aforesaid, possessors and proprietors of the said house and premises, until the erection of the obstructions on the said street, or thoroughfare, by the said respondent, defendant in the Court below, complained of by the said appellants : considering that in the title of the said respondent, produced and filed in this cause, his property therein mentioned, acquired by him thereby, was butted and bounded in front in part by the said street; and did not extend beyond or into or upon the said street : considering that the said respondent hath unlawfully made the obstructions aforesaid complained of, against him by the said appellants, without right or title by him so to

do, by illegally erecting across the said street, a wooden fence, and other buildings and tenements, upon the said street, and by planting the same with trees and shrubs : considering that in the judgment of the Superior Court, sitting at Montreal, on the 30th day of December, 1861, dismissing the action of the said appellants, plaintiffs aforesaid, there is error, doth reverse and set aside the said judgment ; and this Court proceeding to render the judgment which the Court below ought to have rendered, doth maintain the said action of the said appellants, plaintiffs aforesaid, and doth order and adjudge that the said respondent do, within twenty days, after the service upon him of this judgment, remove from the said street the said fence and other buildings, and the said trees and shrubs, and restore to the said appellants, plaintiffs aforesaid, their right of way to, and the full and free use of the said street, or thoroughfare, from their house and premises aforesaid, into, through, over and upon the said street, or thoroughfare, to the said street, called Mountain street, and from thence back again through the said street, and thoroughfare to their said house and premises ; failing which removal of the said obstructions, and of the rendering and restoration of the right of way and use of the said street, that the said fence, other buildings, trees and shrubs shall and may be removed as aforesaid by the said appellants, plaintiffs aforesaid, at the cost and expense of the said respondent, defendant aforesaid, in due course of law, dismissing the demand of the said appellants for damages by them claimed in and by their said action, the whole with costs, &c.

TORRANCE et MORRIS, pour les appelants

DORION, DORION et SÉNÉCAL, pour l'intimé.

Autorités citées par l'appelant.

Curasson, *Actions Possessoires*, p. 202, No. 31 ; p. 240, No. 47 ; pp. 209, 267, 369 :—Troplong, *Prescription*, Nos. 156, 158, 163 :—Marcadé, *Prescription*, pp. 52, 53 :—Nouv. Den., vbo. *Chemin*, §3, No. 5 ; §5, Nos. 1, 2, 4 :—2 Proudhon, *Dom. Publ.*, Nos. 564, 353, 346 :—Pothier, *Prescription*, Nos. 7, 191 :—1 Bourjon, *Titre 22*, §4, No. 24 ; cap. 2 :—2 Gr. Cout., 498, 499, No. 13 :—Paris, 118 :—2 Pardessus, *Servit.*, p. 312 :—2 Bing., N. C. 281 :—2 Starkie, *Evid.*, 317 :—2 East., 154.

COUR SUPÉRIEURE.—QUÉBEC.

Présent :—TASCHEREAU, Juge.

No. 153. { GUY..... Demanderesse.
vs.
GOUDREAU..... Défenderesse.

Jugé :—Qu'une exception perpétuelle alléguant que le demandeur savait, lors de l'exécution du bail d'une maison, que le défendeur entendait y tenir une maison déréglée, n'est pas une réponse à une action en ejectment, fondée sur ce que le défendeur occupait la maison pour des fins illicites ; et telle exception sera rejetée sur une défense au fonds en droit.

Held :—That a perpetual exception alleging that the plaintiff knew, at the time of the execution of the lease of a house, that the defendant intended to keep a house of ill-fame in it, is not an answer to an action in ejectment, founded upon an allegation that the defendant occupied the house for unlawful purposes ; and such exception will be rejected on demurrer.

Jugement rendu le 18 février, 1864

La demanderesse poursuivait la défenderesse pour faire rescinder et annuler un bail à loyer par elle fait en faveur de la défenderesse, d'une maison et dépendances situées à Québec, parce que la défenderesse avait employé les lieux loués à des fins illégales, et y avait tenu une maison déréglée et de débauche, et qu'elle causait constamment des scandales publics, et ce contrairement aux vœux de la demanderesse, et contre son gré et volonté et malgré ses défenses réitérées.

A cette action la défenderesse plaida par exception péremptoire en droit perpétuelle : “ Qu'avant la passation du bail en question, la demanderesse occupait les lieux mentionnés au dit bail, et y tenait et y avait tenu depuis longues années une maison déréglée. ”

“ Qu'en consentant le dit bail il fut en dehors du dit bail convenu et entendu expressément entre les parties demanderesse et défenderesse, que celle-ci, en prenant possession des lieux mentionnés au dit acte, devait les occuper comme maîtresse d'une maison semblable à celle qu'y tenait et y avait tenu la demanderesse. ”

La demanderesse répondit en droit que l'exception péremptoire de la défenderesse ne pouvait être maintenue.

“ Parce qu'il n'appert pas par le bail, non plus que par la déclaration, que la maison ait été louée pour les fins mentionnées dans la dite exception.

“ Parce que par le Stat. Ref. du B.-C., Ch. 40, sec. 1, §3, il est statué que le locateur aura droit d'action contre son locataire pour rescinder le bail quand le locataire emploie les lieux à des fins illégales.

“ Parce qu'en supposant que la défenderesse aurait loué la maison de la demanderesse pour les fins mentionnées dans la dite exception, la défenderesse ne serait pas fondée en loi à offrir cette raison comme moyen de défense à l'action.

“ Parce que les moyens invoqués par la défenderesse sont contraires aux bonnes mœurs, et ne peuvent être sanctionnés par la Cour.

“ Parce que, par la loi, la défenderesse ne peut être reçue à prouver que la demanderesse, lorsqu'elle a fait le bail, avait connaissance du mauvais usage que la défenderesse se proposait de faire de la dite maison. ”

MALOUX, pour la demanderesse : Tout engagement doit avoir une cause honnête, et lorsque la cause pour laquelle l'engagement a eu lieu blesse la justice, la bonne foi ou les bonnes mœurs, cet engagement est nul, ainsi que le contrat qu'il renferme. Or, les allégations de l'exception péremptoire en droit de la défenderesse vont à démontrer que le but pour lequel elle avait loué la maison de la demanderesse était d'y tenir une maison de débauche, et par tant, la défense ne peut être valable, car elle va à établir la nullité même du contrat. D'ailleurs, la défenderesse ne pourrait être reçue à faire la preuve du contenu de son exception. (1)

(1) Pothier, Louage, Nos. 24 et 25. Il n'y a que le ministère public qui puisse être reçu à prouver que le propriétaire, lorsqu'il a fait le bail, avait connaissance du mauvais usage qu'on se proposait de faire de sa maison. Le locataire ne serait pas reçu à offrir cette preuve.—Pothier, Oblig., Nos. 41 et 43.—Domat, Des conventions :—Code Civil, (Nap.) Nos. 1163, 1173, 1387 :—S. Dalloz, Dict., p. 285, Art. 11, Sec. 2, Nos. 331 et 332.

Jugement, La Cour :—Considérant que l'allégation contenue en l'exception péremptoire de la défenderesse, savoir : qu'il fut entendue entre la demanderesse et la défenderesse, lors de la passation du bail en question en cette cause, que la défenderesse devait occuper la maison à elle louée par le dit bail, comme maîtresse d'une maison semblable à celle qu'y tenait et avait tenu la demanderesse, savoir : une maison de prostitution, est illégale et ne produirait aucun effet à l'encontre de la demande de la demanderesse, et, qu'en autant, la dite allégation est inapplicable et ne peut être maintenue ; maintient la réponse en droit de la demanderesse et renvoie la dite exception.

LÉGARÉ et MALOUIN, pour la demanderesse.

PLAMONDON et GUILBAULT, pour la défenderesse.

SUPERIOR COURT.—QUEBEC.

Before :—STUART, Justice.

No. 135.	{	DORION.....	Plaintiff.
		vs.	
		GRANT.....	Defendant.
		and	
		PATTERSON, et al.,	Opponents.

Held :—1o. That the contestation of a report of distribution and collocation, is a pleading in the nature of a demurrer, *défense au fonds en droit*, under which no matter of fact can be inquired into.

2o. That, in the case submitted, the contestation resting upon matters of fact, the parties contesting ought to have pleaded to the opposition. (1)

Jugé :—1o. Que la contestation d'un rapport de distribution et de collocation, est une procédure de la nature d'une défense au fonds en droit, sous laquelle l'on ne peut s'enquérir d'aucun fait.

2o. Que, dans l'espèce, la contestation reposant sur des matières de fait, les parties contestant eussent dû plaider à l'opposition.

Judgment rendered the 5th February, 1864.

This was a case originally pending in the district of Three Rivers, in which the sheriff of that district had in his hands a sum of money arising from the sale of certain immoveable property belonging to the defendant.

(1) *Doutney vs. Mullin*, 13 L.-C. Rep., 245.

Two oppositions *afin de conserver* were filed, one on the part of the Crown, and the other on the part of Pemberton Paterson, *et al.* The prothonotary filed a report of distribution collocating both opposants; whereupon the opposants, Paterson, *et al.*, moved to have the report homologated.

The plaintiff then filed a contestation of the report, and prayed that the *items* referring to the opposition of Paterson, *et al.*, be struck out, on the ground that the sum claimed by their opposition had been fully paid and satisfied.

At this stage of the case, the Judge presiding in the district of Three Rivers, Mr. Justice Polette, declared himself *récusable*, (as having been concerned in the case previous to his elevation to the Bench) and ordered the record to be transmitted to Quebec.

After this had been done, a motion was made, on the 1st February, 1864, on behalf of the opposants, Paterson, *et al.*:
 “ That the contestation of the report of distribution in this
 “ cause made and filed by and on behalf of the plaintiff,
 “ be rejected and struck from the files in this cause, with
 “ costs; because the said contestation was served and filed
 “ long after the time allowed in that behalf by the rules of
 “ this Court, and because such contestation rests upon
 “ disputed facts, which, by the practice of this Court, can-
 “ not be investigated by means of a contestation of a report of
 “ distribution.”

The motion was granted with costs, and, in rendering judgment, the Court remarked that a contestation to a report of distribution was in the nature of a demurrer, *dé-fense au fonds en droit*, under which no *enquête* could be had, and that, in the case before the Court, the contestation rested upon matters of fact which could only be inquired into by a contestation of the opposition.

BURN, for plaintiff.

HART and McDougall, for opposants.

Counsel at Quebec.

LAMPSON, G., for plaintiff.

VANNOUVS, for opposants.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
 EN APPEL.

Présents :—DUVAL, MEREDITH, MONDELET et BADGLEY,
 Juges.

GUY..... *Appelante.*
 et
 GUY..... *Intimé.*

Jugé :—Qu'un partage entre majeurs appelés à une succession, et grevés eux-mêmes, fait du vivant du premier substitué, ne peut être mis au néant après un laps de plus de dix ans sous prétexte ; 1o. du défaut de nomination d'un tuteur à la substitution ; 2o. de l'absence d'évaluation des biens partagés ; 3o. de la non ouverture de la substitution en faveur des copartageants au temps du partage ; et 4o. de lésion du tiers au quart ; les copartageants ayant eu la possession des biens, du moins en partie, pendant la vie du premier grevé.

Held :—That a partition between parties of full age succeeding to an estate, made during the life-time of the first substituted, cannot be set aside after the lapse of ten years and more by reason ; 1o. of the absence of the nomination of a tutor *ad hoc* to the substitution ; 2o. by reason of the absence of any valuation of the immovables *partagés* ; 3o. of the substitution in favor of the *co-partageants* not being open at the period of the partition ; and 4o. of the *lésion du tiers au quart* ; the co-partitioners having had possession of the estate, at least of a portion, during the life-time of the *premier grevé*.

Jugement rendu le 1er mars, 1864.

Action en rescision de partage, intentée le 19 février, 1862.

L'intimé, demandeur en Cour de première instance, alléguait dans sa déclaration :

Que feu Etienne Guy, père, laissa, de son mariage avec Dame Catherine Vallée, trois enfants, les deux défendeurs, Etienne Guy et Hélène Guy, cette dernière l'appelante, et lui-même Michel Patrice Guy.

Que le 12 décembre, 1820, le dit Etienne Guy, père, fit son testament, Bedoin, notaire, par lequel il légua à son épouse tous ses biens meubles et immeubles, sans exception, pour par elle en jouir, durant sa vie, à titre d'usufruit seulement, qu'avenant le décès de sa dite épouse, et l'extinction par son décès de l'usufruit à elle légué, le testateur donna et légua les mêmes biens, sans exception ni réserve quelconque, à tels enfants qui se trouveraient alors

existant, pour par eux en jouir à titre d'usufruit seulement, pendant la vie naturelle de tels enfants, la volonté du testateur étant que si lors du décès de sa dite épouse il se trouvait des enfants vivants ou à naître en légitime mariage, ils représenteraient leur père ou mère à l'effet de partager le dit usufruit par souches, suivant l'ordre de succession ; que ce testament fut dûment publié après le décès du dit Etienne Guy, père, survenu le 29 décembre, 1820 ; qu'après son décès, la dite Dame Catherine Vallée aurait, aux termes du dit testament, pris possession de tous les biens composant la succession et en aurait joui jusqu'à l'heure de son décès, arrivé le 2 mars, 1853, laissant pour seuls et uniques représentants et enfants issus de son mariage avec le dit Etienne Guy, père, Etienne Guy et Hélène Guy, les défendeurs en cette cause, et lui, le demandeur, intimé.

Que le 26 octobre, 1831, par acte reçu devant Mtre. Marteau, et son confrère, notaires, il aurait été procédé au partage des biens immobiliers dépendant de la succession du dit feu Etienne Guy, entre les enfants, les parties ci-dessus nommées, sans aucune intervention ou participation de la part de Dame Catherine Vallée, leur mère.

Le préambule de cet acte de partage contient la déclaration suivante :

“ Que par et en vertu du testament solennel du dit feu
 “ Etienne Guy, le dit Etienne Guy aurait légué à la dite
 “ Dame Catherine Vallée, son épouse, la jouissance et
 “ usufruit de tous ses biens généralement quelconques,
 “ pour, le dit usufruit éteint, retourner et appartenir la
 “ jouissance et usufruit seulement des dits biens aux co-
 “ partageants sus-nommés ; que, quant à la propriété des
 “ dits biens, le dit feu Etienne Guy l'a léguée à ses petits
 “ enfants, c'est-à-dire, aux enfants de ses enfants sus-nom-
 “ més ; quoique l'usufruit légué à la dite Dame Catherine
 “ Vallée, ne soit pas encore éteint, les dits copartageants
 “ désirant connaître chacun sa part et portion dans les dits

“ biens immobiliers, en conséquence, ils'les auraient pour
 “ ce fait partager entre eux à l'amiable, ainsi et de la ma-
 “ nière qui suit, &c. ”

Le demandeur intimé demande la nullité du partage pour les raisons suivantes :

1o. Parce qu'il n'aurait été nommé aucun curateur ou tuteur à la substitution créée par ce testament.

2o. Parce qu'il n'y avait jamais eu aucune évaluation des immeubles sujets au partage.

3o. Parce que ce partage fut fait pendant la jouissance et possession de Dame Catherine Vallée de ces mêmes biens, et avant que les parties au partage n'y eussent aucun droit, leur droit à la propriété et à la jouissance des biens ne commençant, aux termes du testament, qu'à la mort de leur mère, laquelle vivait encore à l'époque du prétendu partage.

4o. Parce que par ce prétendu partage, le demandeur intimé a été lésé, et que la lésion par lui subie était de plus du quart de la valeur de la portion à lui assignée.

Par ce partage il est échu à la défenderesse, Hélène Guy, l'appelante, cinq lots de terre et une rente constituée de £3 par année.

Il est échu à Etienne Guy, trois lots de terre et trois rentes constituées s'élevant à £48.

Michel Patrice Guy, le demandeur intimé, a eu pour son lot des rentes constituées au montant de £86 par année, et deux terrains.

Etienne Guy, l'un des défendeurs, s'en rapporta à justice, en déclarant que le partage avait été fait de bonne foi, et exécuté depuis plus de trente ans, et qu'il le considérait valable en tant que lui et ses co-usufruitiers y étaient concernés, durant leur vie, laissant à ses enfants et à ceux de son frère et de sa sœur, comme propriétaires, de faire un

nouveau partage si bon leur semblait, avant que d'entrer en possession.

Hélène Guy, l'appelante, plaïda :

1o. Par une exception péremptoire, qu'il s'était écoulé plus de dix ans, et même plus de trente ans, depuis la date du partage, sans que le demandeur intimé se fût pourvu en rescision de cet acte, et, par conséquent, qu'il y avait prescription contre la demande.

2o. Par une seconde exception, elle alléguait que ce partage était légal, malgré que leur mère eût l'usufruit des biens ; que d'ailleurs, il était de fait, que leur mère, Catherine Vallée, avait consenti à ce partage en vertu duquel ses trois enfants prirent possession des biens ; elle nia que le demandeur, intimé, eût été lésé par ce partage, et prétendit que pendant les 25 ans qui ont suivi la date de cet acte, inclusivement jusqu'à la fin de l'année 1856, les biens composant le lot de l'intimé, avaient été d'une plus grande valeur que les siens, et que ce fût elle qui fût lésée par ce partage, et non pas l'intimé. Elle alléguait que par le partage, les copartageants avaient renoncé au droit de se plaindre de toute lésion qui pourrait arriver dans la division des biens, et que cette stipulation rendait l'intimé non recevable dans sa demande.

Elle a prétendu, de plus, que l'intimé était non fondé en loi à se plaindre du fait qu'un tuteur n'avait pas été élu à la substitution, que les appelés ou substitués seuls pourraient se plaindre sous ce rapport, en temps et lieu.

Comme dernier moyen au soutien de cette exception, l'appelante alléguait que l'intimé avait toujours considéré l'acte de partage valable, et, qu'en vertu de cet acte, il avait touché des capitaux de rentes, et avait vendu une partie des biens à lui assignés par ce partage, et, qu'en agissant de la sorte, il avait ratifié cet acte dont il ne pouvait plus se plaindre.

Cette seconde exception fut suivie d'une défense générale.

Par ses réponses, l'intimé prétendit que la prescription de dix ans ne pouvait s'appliquer à l'acte en question, qui avait été fait pendant la vie de leur mère grevée de substitution, n'avait jamais été exécuté, et ne pouvait compter que du jour du décès de leur mère.

Les parties procédèrent à la preuve, et le 4 mars, 1863, la Cour Supérieure rendit le jugement qui suit :

La Cour, après avoir entendu le demandeur et la dite Dame Hélène Guy, défenderesse, par leurs avocats, sur le mérite de cette cause ; vu la déclaration faite par le défendeur, Etienne Guy, que le partage dont il est question a été fait de bonne foi, qu'il a été exécuté suivant sa forme et teneur, depuis sa date jusqu'à ce jour, savoir : le 3 mai, 1862, ce qui forme un laps de temps de plus de trente ans, et qu'il le considère valable sous tous rapports, en autant que lui et ses co-usufruitiers y sont concernés, durant leur vie, laissant à leurs enfants légitimes, comme propriétaires, de faire un nouveau partage si bon leur semble, avant que d'entrer en possession, afin d'éviter toute contestation entre frères et sœurs, il s'en rapporte sur le tout à ce qu'il plaira à la Cour de décider ; avoir examiné la procédure, pièces produites et le témoignage, et avoir sur le tout délibéré ; considérant qu'après le décès de feu Etienne Guy, mentionné dans les plaidoyers en cette cause, arrivé le 29 décembre, 1820, sa veuve, Catherine Vallée, s'est mise et est entrée en possession de l'usufruit établi en sa faveur par le testament du dit Etienne Guy, en date du 12 décembre, 1820 ; vu qu'il résulte de la preuve produite en cette cause que la dite Dame Catherine Vallée, a joui du dit droit d'usufruit depuis le décès de son dit époux jusqu'au 2 mars, 1853, jour du décès de la dite Dame Catherine Vallée, et cela sans interruption ; considérant qu'au temps du prétendu partage du 26 octobre, 1831, entre le demandeur et les défendeurs, les dits co-partageants n'étaient pas en pos-

session du dit usufruit, et ne se sont mis en possession qu'à la mort de la dite dame Catherine Vallée ; considérant que ni au temps du dit prétendu partage, ni à l'époque de l'entrée en possession du dit usufruit par le dit demandeur et les défendeurs, aucune évaluation des dits biens, meubles et immeubles, grevés du dit usufruit n'a été faite, vu qu'il n'y a pas eu de curateur de nommé aux fins du dit partage, et pour veiller aux intérêts de ceux qui étaient appelés comme légataires en propriété des dits biens, meubles et immeubles ; considérant que le dit partage fut fait pendant la durée de l'usufruit de la dite dame Catherine Vallée, et lorsqu'elle était, aux termes du testament du dit Etienne Guy, en possession, comme usufruitière, de tous les biens, meubles et immeubles, mentionnés dans le dit prétendu partage, vu qu'il n'appert pas que la dite dame Catherine Vallée, usufruitière en possession, comme susdit, ait jamais consenti au dit prétendu partage du 26 octobre, 1831, ou qu'elle ait jamais ratifié ou approuvé le dit prétendu partage ; considérant que sous les circonstances établies par la preuve et ci-dessus constatées, le dit partage du 26 octobre, 1831, est illégal, nul et de nul effet en loi ; que, supposant que le dit acte de partage fut légal, il a eu un effet seulement depuis le 2 mai, 1853, jour du décès de la dite dame Catherine Vallée, et que, partant, la prescription invoquée par la défenderesse ne s'applique pas en cette cause, a débouté et déboute les exceptions péremptoires, par la défenderesse plaidée en cette cause, et procédant à juger sur le mérite de la demande du demandeur ; considérant que le demandeur a établi par la preuve et en droit que le dit prétendu partage du 26 octobre, 1831, était et est illégal et nul, maintient l'action du demandeur ; la Cour, en conséquence, déclare le dit partage du 26 octobre, 1831, reçu devant M^{re}. L. Marteau, et son confrère, notaires, rescindé, annulé, nul et de nul effet, et la Cour le met au néant, et ce, pour les raisons mentionnées ci-haut, le tout avec dépens, réservant au demandeur tout et tel recours qu'en droit et en justice lui appartient pour le re-

couvrement des profits et revenus, perçus par les défendeurs en vertu de tel partage. (1)

MONDELET, Juge.— L'intimé s'était pourvu devant la Cour Supérieure, siégeant à Montréal, pour faire mettre de côté, un partage fait entre lui et les appelants, en date du 26 octobre, 1831, des biens immobiliers dépendant de la succession de feu Etienne Guy, leur père.

L'intimé se fonde sur plusieurs raisons, entre autres, les suivantes :

1o. Qu'il n'aurait été nommé aucun curateur ou tuteur à la substitution créée par le testament du dit feu Etienne Guy.

2o. Qu'il n'y a jamais eu aucune évaluation des immeubles sujets au partage.

3o. Parce que ce partage fut fait pendant la jouissance et possession de Dame Catherine Vallée, (veuve du dit feu Etienne Guy,) et avant que les parties au partage n'y eussent aucun droit, leur droit à la propriété et à la jouissance des biens, ne commençant, aux termes du testament, qu'à la mort de leur mère, laquelle vivait encore à l'époque du prétendu partage.

4o. Parce que, par ce prétendu partage, l'intimé a été lésé, et que la lésion par lui subie, était de plus du quart de la valeur de la portion à lui assignée.

Etienne Guy, l'un des défendeurs s'en rapporta à justice.

L'appelante, répondit que l'action devait être renvoyée, parce que ;

1o. L'intimé ne s'était pas pourvu dans les dix ans après le partage, et qu'il s'était écoulé plus de trente ans depuis.

(1) Autorités citées par l'appelante :
Pothier, Nos. 541, 564, 565, 566 :—5 Toullier, No. 801 :—2 Ricard, Traité 3, chap. 9, sect. 3, part. 1, p. 407 et suiv. et Nos. 696, 701, 704, 708 :—Guyot, Rép. vbo. Partage, p. 612 :

20. Que le partage était légal et permis, bien que ce fût du temps de la veuve, leur mère, qui avait la jouissance ; que ce partage l'était d'une succession qui leur était destinée ; que ce partage était égal et juste, et qu'il avait eu son exécution du consentement de leur mère.

30. Point de lésion ; au contraire, les biens de l'intimé, lors du partage, avaient plus de valeur que ceux de l'appelante, qui n'ont augmenté de valeur que dernièrement.

Voici les questions qui se présentaient :

10. Le testament de feu Etienne Guy, comporte-t-il une substitution, et les appelés au second degré, pouvaient-ils procéder légalement à un partage de biens, dans lesquels ils n'avaient qu'une espérance ? Ce partage est-il nul ?

20. A-t-on pu ainsi procéder à un partage, sans tuteur à la substitution, et sans évaluation faite des biens, au préalable ?

30. Supposant le partage valable, la prescription de l'ordonnance compterait-elle de la date de ce partage, ou seulement du jour que les parties au partage ont eu la possession par la mort de leur mère ?

40. Y a-t-il eu lésion suffisante pour donner à l'intimé droit à obtenir la rescision du partage ?

50. A-t-il tellement ratifié ou approuvé ce partage qu'il soit maintenant déchu du droit d'en demander la mise au néant ?

Je pense :

10. Que ces enfants pouvaient *provisoirement* faire ce partage, même du vivant de leur mère, et durant sa jouissance. Car, à proprement parler, c'est moins un partage *réel*, qu'un état pour établir, par anticipation, ce qu'il leur pourrait revenir, par la suite, si le cas y échéait. Ce

n'est pas spéculer ou tabler sur la succession d'un père (testateur) vivant, ce qui serait immoral et est prohibé par la loi, c'est purement et simplement convenir de la manière dont se feraient les choses, si jamais l'occasion surgissait de donner suite à cet arrangement.

2o. Ainsi, qu'il y ait, ou non, substitution, la question demeure la même, et ne peut recevoir aucune atteinte défavorable aux prétentions de l'appelante, par le fait que la veuve vivait.

3o. Il en doit être de même, à raison de la difficulté que l'intimé fait résulter de la non nomination d'un tuteur à la substitution. Il ne s'agit pas des droits des substitués ou de leur ordre, le partage ne touche aucunement à ces droits, et les substitués, si le cas y échet, prendront leurs parts comme si rien n'eût été fait.

4o. Je fais la même observation à la non évaluation des biens. Les substitués ne peuvent être privés d'aucun de leurs droits par ce partage, ou plutôt cet arrangement provisoire.

5o. La prescription court (du moins suivant moi, car il y a partage d'avis sur cette question,) du jour du partage, et non de la prise de possession par la mort de la veuve. Je tiens que c'est un arrangement provisoire, auquel on pourrait donner ou ne pas donner suite, en sorte que tout naturellement et en raison, doit-on dire, que c'est dans les dix ans, que l'intimé a pu se pourvoir contre ces conventions provisoires.

6o. Il me paraît que c'est la valeur des terrains, *lors du partage*, qui doit être la mesure de la lésion, s'il y en a eu, et non pas la valeur survenue depuis, par suite de causes imprévues lors du partage ; cela posé, non seulement l'intimé n'a pas établi lésion, mais la preuve constate que son lot avait, lors du partage, plus de valeur que celui de l'appelante.

70. L'intimé est, suivant moi, déchu du droit de revenir contre cet accord, ou arrangement provisoire, disons conservatoire, qu'il a ratifié, approuvé, et auquel il a donné suite, tout aussi longtemps qu'il a cru de son intérêt de le faire.

80. Il me paraît en outre, et je ne le dit que d'abondant, que la veuve, mère des parties, a, tacitement du moins, approuvé cet arrangement.

D'après ces raisons, je suis d'avis que le jugement dont est appel, est mal fondé en droit et en fait, qu'il doit être infirmé, et l'action de l'intimé déboutée.

Je dois remarquer que j'ai énoncé mes propres opinions, sans en rendre solidaires mes Honorables collègues. La Cour est unanime quant aux motifs du jugement, tel que je l'ai rédigé, et que je vais le lire.

La Cour, &c.—Considérant que le partage dont il est question, savoir : le partage du 26 octobre, 1831, et dont l'intimé, par son action en Cour de première instance, réclamait l'annulation et mise au néant, pour les raisons et causes énoncées en sa déclaration, est en loi légale, et a pu être fait et conclu, comme il l'a été, valablement entre les parties à icelui, qui n'ont statué que sur les parts d'usufruit qu'elles recueillaient du chef de leur père, feu Etienne Guy, et qu'en icelui dit partage, il n'y a eu aucune lésion, les dites parties à icelui, d'ailleurs, étant majeures.

Considérant que par le dit partage, les dites parties à icelui, majeures, et à toutes fins, en droit de le faire, pour établir purement et simplement ce qui pourrait éventuellement leur revenir dans leurs droits à recueillir du chef du dit feu Etienne Guy, est obligatoire pour toutes les dites parties au dit partage.

Considérant que dans le jugement dont est appel, il y a par conséquent, erreur, casse, annulle et met au néant le

dît jugement, savoir : le jugement rendu par la Cour Supérieure, siégeant à Montréal, le 4 mars, 1863, et cette Cour procédant à rendre le jugement que la dite Cour de première instance eût du rendre, déclare l'intimé mal fondé en son action, laquelle est par le présent jugement déboutée, avec tous les dépens, tant dans la Cour de première instance qu'en cette Cour.

LEBLANC et CASSIDY, pour l'appelants.

LAFLAMME, R. et G., pour l'intimé.

QUEEN'S BENCH, }
APPEAL SIDE. }

DISTRICT OF MONTREAL

Before :—DUVAL, Chief-Justice, MEREDITH, MONDELET,
and BADGLEY, Justices.

SEWELL, *Appellant.*

and

VANNEVER, *et al.*, *Respondents.*

Held :—1c. That in case of arrest under *copias ad respondendum*, the defendant may put in special bail even after judgment rendered in the original suit, upon application to extend the delay for putting in such bail, and upon sufficient cause shewn.

2c. That the sureties of the defendant who have given bail for his appearance to the sheriff, have also, by law, the right, upon failure of the defendant so to do, to put in such special bail, upon application for that purpose, and upon sufficient cause being likewise shewn.

3c. That the bond to be given by the special bail is the same as was required by "the laws of Lower Canada in force" before the passing of the 12th Vic., cap. 42, namely, by the 5th Geo. IV., cap. 2.

Jugé.—1c. Que dans le cas d'arrestation en vertu de *copias ad respondendum*, le défendeur peut donner cautionnement spécial même après jugement rendu dans la cause, sur application pour prolonger le délai pour donner tel cautionnement, appuyée de raisons suffisantes.

2c. Que les cautions du défendeur, qui ont fourni cautionnement pour sa comparution au shérif, ont aussi le droit, sur défaut du défendeur de ce faire, de donner cautionnement spécial, sur application pour cet objet, appuyée de même de raisons suffisantes.

3c. Que le cautionnement qui doit être fourni par les cautions spéciales est le même que celui requis par les lois en force dans le Bas-Canada, avant la passation de la 12me Vic., cap. 42, savoir, par la 5me Geo. IV., cap. 2.

Judgment rendered the 9th March, 1864.

The appeal was instituted from a judgment rendered in a cause pending in the Superior Court, in the district of

Saint Francis, wherein the respondents were plaintiffs, and one De Courtenay, defendant, refusing the application of the appellant, one of the [defendant's bail to the sheriff, praying leave to put in special bail. It is recorded in these terms: "The prayer of petitioners to put in special bail is rejected with costs."

The action in which this petition of the appellant was denied, commenced by a writ of *capias ad respondendum* against the body of the said De Courtenay. He had, some time previous to the issuing of the writ, been a resident in the said district of St. Francis, but had removed therefrom; and at the period of the suing out of the process against him was domiciled at the parish of St. Foy, in the district of Quebec.

The writ issued out of the Court at Sherbrooke, returnable there, on the first day of October, 1861; it was addressed to the sheriff of the district of Quebec, who arrested the defendant at his residence in the said parish of St. Foy.

At the request of the defendant, the appellant consented to become bail to the sheriff, and thereupon entered into the usual bond. On the 9th of the month of October, De Courtenay applied to the Court at Sherbrooke for permission to put in special bail, and prayed leave to do so at Quebec, setting forth in his petition for that purpose, that, under the writ of *capias*, he had been arrested in the district of Quebec, and had there given bail to the sheriff of that district, that the condition of the bond by him and his bail entered into, was, that on or before the return day of the said writ, or within eight days thereafter, he should give security as by law provided, or put in special bail to the action; that in discharge of his said bail to the sheriff, he was desirous of either giving the said security, or of putting in special bail, but that he was unable to furnish such security or special bail in the district of St. Francis, but

was prepared to give it before the Court in the district of Quebec, where he was then residing ; and he prayed that he might be permitted to put in such security or special bail before one of the Judges of the Court, or the prothonotary, at Quebec, on such day as the said Court at Sherbrooke might be pleased to appoint.

The truth of the facts set forth in this petition was established by the defendant's affidavit. The presentation of the petition to the Court at Sherbrooke, in the district of St. Francis, took place within the eight days next after the return day of the said writ of *capias ad respondendum*.

The judgment of the Court, there, upon the application to give security or a bail bond at Quebec, is in these words : " Parties are heard on petition, petition is rejected with costs. "

The respondents prosecuted their action against DeCourt-nay, and, on the 17th June, 1862, obtained judgment for the sum of \$1307.62 cents, with interest from the 4th September, 1861, and costs.

The appellant, subsequently learning his position, and the liability he had incurred towards the respondents, presented to the Court, sitting at Sherbrooke, a memorial asking permission to put in special bail in discharge of his previous bond to the sheriff. This he did on the 13th March, 1863, and in it he represented that he had always purposed such bail should be given, and had, in the month of October, 1861, within the time appointed by law, caused the defendant to petition the Judge at Sherbrooke for leave so to do, and from that period had been under the impression that special bail had in fact been received, and therefore he had given the matter no further thought. These averments were supported by his own affidavit, as well as by that of the defendant ; notwithstanding this, however, his prayer was refused by the Court below, the judgment.

thereon being, as before stated, that his petition was rejected with costs.

It was from this judgment that an appeal was instituted,

On behalf of the appellant it was said :—

It may be remarked that neither the judgment disallowing the memorial of the defendant for leave to give security or bail in the district of Quebec, nor that rejecting the petition of the appellant for permission to enter special bail in Sherbrooke, discloses any reasons ; and therefore the appellant is uncertain as to the motives upon which those determinations so adverse to his interest were founded ; he finds, however, on reference to the judgment appealed from, which is reported in the Lower Canada Jurist, vol. 7, page 120, that, from the remarks therein stated to have been made by the learned judge on delivering his opinion, the petition appears to have been rejected because the Court below considered it had been presented after the period fixed by the statute, and that there was no room left for a construction of the statute, but that the Court was bound by its letter.

The appellant respectfully submits that he is aggrieved by these decisions of the Court below, which fasten upon him a liability towards the respondents to so large an amount as a sum exceeding \$1300. He believes the policy of the law at this period, whatever it may have been in former years, to be entirely adverse to such an interpretation of the statute, and at variance with its spirit ; he sees that the proceedings against a debtor formerly so rigorous in England, from which country the process of *capias ad respondendum* was introduced into Canada, as to permit the arrest of the person in almost every case, were, at the earliest period of canadian legislation, after the cession of the colony to the British Crown, so far modified, that the arrest before judgment was not permitted, except upon an affidavit that the defendant was on the point of leaving the province,

whereby the plaintiff might be deprived of his remedy against him. (1)

Indeed the legislation upon the subject has been in England, as well as in this country, for a series of years past, constantly and steadily leading to the protection of the person of the debtor from imprisonment, while, at the same time, it aims to make his property available to his creditors—we have seen additional facilities from time to time afforded for the taking of the absconding debtor, but such arrest is not sanctioned unless there be a fraudulent intention in leaving the province ; and whereas formerly the imprisonment of the body in execution for debt was permitted in all cases where the *capias ad respondendum* had issued, as well as in satisfaction of all judgments given in commercial matters, now, in Canada at least, the execution against the body, or *capias ad satisfaciendum*, is abolished. We now find that by means of the security bond which the law allows the defendant to give, he cannot be constrained even to remain in the province if he has committed no fraud as regards his estate, but has fairly given it up for the benefit of his creditors. Thus the entire aim of the law at the present day is that property shall be liable for debts, but that the person shall be free, so long as the debtor is not guilty of fraud in respect of his estate ; consequently the arrest of the body is permitted under the writ of *capias ad respondendum* entirely with this view ; and the bond required to be given to the sheriff is also to the same end, that the estate of the debtor shall be delivered honestly to the creditor ; and nothing else is demanded of the debtor or his bail.

The early ordinances of Canada (2) regulating the process of attachment against the body, directed that the sheriff should hold the defendant to bail, or commit him to prison, until special bail should be given, or until two days after

(1) 17 Geo. III, chap. 2, and 25 Geo. III; chap. 2.

(2) 17 Geo. III, ch. 2, and 25 Geo. III, ch. 2.

execution might be obtained by the plaintiff. The condition of the special bail then was that the party arrested would surrender himself in execution, his body being, as before remarked, then liable to imprisonment in execution in all cases where the writ of *capias ad respondendum* had issued, as well as in satisfaction of judgments in commercial matters, but at a latter period it was enacted (1) that the recognizance of special bail should be that the defendant should not leave the province without paying the debt : at first, the debtor had to pay or remain in goal in execution ; afterwards, instead of being confined in prison, he was only held to give bail to remain in the province ; and now he is permitted to enter into a security bond which permits him to go where he will, so long as he conducts himself honestly.

The same statute which provided that the recognizance of special bail should be that the defendant should not leave the province without paying his debts, and which corrected the evil of imprisonment in default of payment, expressly provided that such bail might be put in at any time, either before or after judgment, thus distinctly shewing that, at that period, the law intended merely that the creditor should have a right to the presence of his debtor in the province, and nothing more, and that the bail should at no time be held to secure him any thing but this.

The 12 Vic., ch. 42, in its preamble, declares that imprisonment for debt where fraud is not imputable to the debtor, is not only demoralizing in its tendency, but is detrimental to the true interest of the creditor. And it is this act which first permitted the giving of the security bond whereby the debtor is at liberty to range the world if he faithfully put his creditors in possession of his estate. This latter statute is re-enacted in the consolidated statutes of Lower Canada, ch. 87, sec. 3, and contains the following

(1) 5 Geo. IV, ch 2.

clause, exception and proviso, which have given rise (as appears, as before stated, from the report of the case now under consideration), to the refusal of the prayer of the appellant's petition in the Court below. The act in its 12th section declares that nothing therein shall prevent any person arrested under any writ of *capias ad respondendum* from putting in special bail to the action as permitted by the law of Lower Canada then in force. *Excepting* only that such special bail shall not be received unless put in on the return day, or at any time before the return day, or within the eight days next after the return day, *provided always* that it shall be in the power of the Court, upon special application, and sufficient cause shewn, to extend the time for putting in such special bail.

Now the Court below appears to have considered itself precluded by the *exception* in this statute, and therefore rejected the appellant's application, because the period of eight days next after the return day of the action had elapsed before the permission to give special bail was sought; the Court conceiving itself tied and bound by its literal construction of the enactment of the exception, and that no relief could be granted under the provision of the act immediatly following it.

The appellant confidently expects relief, not only by reason of the equity of his prayer, but because he conceives a construction of the statute according to its spirit is favorable to his pretensions; and because the question now submitted has several times come before the Courts in the district of Quebec and Montreal, and so far as the appellant is informed, has always been so decided as to give relief to parties similarly circumstanced. The judges before whom the point has been argued, have held that the delay of eight days is not so fatal to the bail, as the Court below seems to have supposed it. In the case of *Miles and Aspinall*, decided by M. Justice Monk, presiding in the Superior Court, at Montreal, since the ruling of the judge in

the Court below, special bail was permitted to be given after the expiration of the period mentioned in the statute : this case is reported in the Lower Canada Jurist, vol. 7. page 124. A similar application was made some few years since to the late M. Justice Chabot, sitting in a cause which is also reported in the 8th vol. of the Lower Canada Reports, page 138, of *Bégin, et al. vs. Bell, et al.* ; and that learned judge, although he refused the application, did so solely for the reason that no special grounds were set forth in support of it, and not because it was too late to grant it ; that judge stating that the terms of the statute required such a request should be special, and only granted upon sufficient cause shewn. In another cause, the report of which is to be found both in the 3rd L. C. Jurist, page 117 and the 9th L. C. Reports, page 49, *Lefebvre vs. Vallé*, M. Justice Badgley held that special bail may be put in even two years subsequent to the judgment, and after the bail to the sheriff had been sued upon their bond, and this he permitted to be done on petition of the bail themselves, that honorable judge stating it to be true, that the reason assigned in the case before him by the bail, namely, that they were ignorant of the law was certainly a weak one, but that as the application could do no harm to the plaintiff, who had still is security as provided by law, he should grant the application. The question was also brought before the Superior Court at Quebec, presided over by M. Justice Meredith, when special bail was received by him seven months after judgment, and after action on the bond to the sheriff had been instituted. The correctness of this proceeding came to be argued before this honorable Court, sitting in appeal, when the judgment permitting the special bail to be given was not disturbed. The report of this case, in appeal, will be found in the 9th vol. L. C. Reports, page 74, *Campbell & Atkins, et al.* It is true that in this last mentioned case, which was a peculiar one, and presented questions that the present one does not, the Court, composed of four judges, was equally divided, and thus the

decision of Mr. Justice Meredith remained affirmed. The honorable Sir Louis Hypolite LaFontaine, Chief-Justice, expressed an opinion that the application to extend the delay ought properly to be made before the expiration of the period which it was desired to extend, or at least that it should be so before the rendering of the final judgment in the suit : now if it could be under any circumstances allowed after the expiration of the eight days, then the Court is not irremediably bound by the strict letter of the statute ; and if the bail could not be received after the final judgment in the cause, it must be for other reasons, not to be found in the statute. The Honorable M. Justice Caron, who pronounced the judgment in this Honorable Court in the last mentioned case, stated that, one of the questions to be decided was whether the application had been made in time or not, the appellant to establish that it had not been, refers the Court to the 12th Vic., ch. 42, sec. 12, requiring that the bail shall be put in within eight days after the return day of the *capias*. The respondent in answer says this delay may be extended by the Court, on cause shewn, to this the appellant replies, the application to extend the period should be made before such period has elapsed. In this reply the learned judge adds that there is some plausibility, and the terms of the proviso seem to lend themselves to such an interpretation of the statute, but when the spirit of the law is considered, which is entirely in favor of the liberty of the subject, and means to restrain as much as possible imprisonment for debt, we, remarked the judge, come to the conclusion that the power of the Court to extend this delay is not limited to the time during which the delay lasts.

On behalf of the respondents it was contended that, apart from the question as to the power of the Court to have granted the petition, the same was properly rejected for several other reasons.

1st. The petitioners, of whom the appellant was one, were

not parties to the original cause, and there is nothing in the record to show that they ever gave bail to the sheriff, except their affidavits produced with the said petition, and the return of the sheriff to the *capias* shows that the defendant was in his custody, but does not state that he was in the custody of the bail.

2. If a petition to put in special bail were made, it could only have been made by the defendant, who did not petition, and the provisions of the 21st section Consolidated Statutes of Lower Canada, cap. 87, and of the 3rd subsection of section 1st of the same act, only provide for a defendant's being allowed to put in special bail under certain circumstances.

3. The conditions of the bond to be taken by the sheriff are that the defendant shall give security to the Court, while the petitioners allege that the conditions of the bond given by them were, that they, the petitioners, should, within the time provided, give the security required by law, or should put in special bail to the action. No such bond could have been taken by the sheriff, and would have been illegal.

4. The petitioners asked that they might be permitted to put in special bail; this, if granted, could not be carried into effect; it is the defendant who gives the bail, and no legal bond could be executed to which he would not be a party, and he did not join the petitioners, nor express any desire to join them in giving security.

As to the question whether special bail can be given after judgment rendered, the respondents respectfully submit that under the provisions of our statute law as it now is, the Courts have only the discretionary power of extending the time for putting in such bail, upon special application and cause shown while the suit is pending; that after the final judgment has been rendered in any cause, the Court are no longer permitted to exercise that power, and have no jurisdiction in the matter of putting in bail. The terms of the statute

are positive upon that point, and the powers conferred upon the Court cannot be extended. The application in the present instance was to put in special bail, and the only provision of law now in force with regard to such bail declares that such bail shall not be received unless put in within a certain number of days, but that the Court may extend that period, upon application made, and sufficient cause shown. No application was made to extend the time prescribed, and the defendant has forfeited his rights under the law. In fact, in this case, the defendant never has made any application whatsoever to be relieved from his default. By the defendant's failure to put in bail he has relieved himself from the obligation to make the statement which, otherwise, under the 12th section Con. Stat. Lower Canada, Cap. 87, he would have been bound to make, and the respondents have been deprived of the benefit of that statement, and the effect of declaring that a party arrested, or his bail, may at any time after judgment has been rendered, apply to and obtain permission to put in special bail from the Court, would be that the provisions of the law regulating the defendant's arrest for fraud, could not be carried into effect, unless the defendant chooses to perform what his bail bound themselves he should perform—and if bail were allowed to be put in after judgment, the provisions of the 12th section of the act could not be carried into effect.

This case differs entirely from the case of *Campbell vs. Atkins*, (Lower Canada reports Vol. 9, page 74, in which case the question as to the right of putting in bail was fully discussed,) inasmuch as in that case the permission of the Court had been granted to the defendant upon his application, while here he has made no application; and the respondents contend that the petitioners could not legally make the application in their own right and names.

DUVAL, Chief-Justice :—The Courts are to enforce the law as it is, not to criticize or find fault with it. There may be ambiguity in the statute 12 Vict., in using the words "Spe-

cial Bail to the Action." I think the use of these words improper; but under the law as it stands, special bail could manifestly be put in, either under the 5 Geo. IV, or the 12 Vict. The law is plain on that point. In England, where all actions are commenced by *capias*, the bail to the sheriff could put in special bail independently of the defendant; if no appearance were put in the bail was fixed, they could not contest the debt when sued. The bond was for double the amount of the debt, yet in England the plaintiff must endorse on the execution the precise amount of the debt. Could this be done here? I see nothing to authorize such a proceeding. But I think the judgment ought to be reversed on the ground already referred to, namely, that under both the statutes regulating the matter, special bail could be put in.

MONDELET, Justice:—The petitioners having applied to Mr. Justice Short to be permitted to put in special bail for one De Courtenay, who had been arrested on *capias ad respondendum*, at the suit of the respondents, who subsequently obtained judgment against him, Judge Short rejected the petition. No reasons are assigned. But it is surmised that he considered himself bound by the Cons. Stat. L. C. ch. 87, sec. 3, inasmuch as the application was made too late, that is after judgment rendered.

Now, if it be once conceded that the sureties who first became security for the defendant's appearance, have a right, *themselves*, to apply to the Court to give special bail, then, I see no difficulty, because the law does not limit the time at which the special bail shall be given. (1) It is altogether discretionary. The rule is that it should be given on the day of the return of the writ, or at any time before the return, or within the eight days next after the day of such return: "But the Court may, upon special application and sufficient cause shewn, extend the time for putting in such special bail."

The above shows that the judge is not tied down to any

(1) Cons. Stat. L. C. ch. 87, Sec. 3.)

time ; all depends "upon the special application and *sufficient cause shown*."

The putting in of special bail does the plaintiffs no harm, and as the statute is one for the relief of debtors, and the liberty of the subject being at stake, it should be carried out on a principle of humanity, where there is a doubt in the wording of it. However, the section admits of no doubt, therefore, the question is simply as to whether the petitioners shewed *sufficient cause* to entitle them to the conclusions of their petition. I think they have made out a sufficient case, and that they should have been allowed to put in special bail.

The several decisions by Judges Badgley, Monk, Chabot and Meredith, and the confirmation of the judgment of the latter, by the circumstance of the Court of appeals being equally divided, seem to me to be correct.

I am of opinion that the judgment appealed from should be reversed, and the petitioners allowed to put in special bail.

MEREDITH, Justice.—As the main question raised in this cause was fully discussed in the case of Campbell and Atkins, (1) I shall not attempt to go over the ground covered by the very able judgment pronounced in that case by Mr. Justice Caron, but shall confine myself to a brief statement of the reasons which prevent me from concurring in the opinion expressed by the learned Judges who were disposed to reverse the judgment of the Superior Court in the case just mentioned. According to the opinion of those learned Judges, a debtor arrested under the 12 Vic., cap. 42, has not a right to give special bail by a bond such as permitted by the 5th Geo. 4, cap. 2 ; that being the law in force, on the same subject, before the passing of the 12 Vic., cap. 42.

On the contrary, according to the opinion of the same Judges, as I understand it, every debtor arrested under the

(1) Campbell and Atkins, 9 L. C. Rep. p. 74

12 Vic., cap. 42, and condemned to pay £20, or more, is bound, if he cannot pay the judgment, to file a statement of his assets and liabilities, such as mentioned in the 4th and 5th sections of the statute, in order that, thereupon, the proceedings for the winding up of the estates of insolvent debtors established by the act, may be had, with respect to his property.

This opinion, I must say, although I do so with much deference, does not seem to me to be justified either by the letter or spirit of the law.

The primary object of the 12th Vic., cap. 42, as stated in the title, is "*to abolish imprisonment for debt*;" and in the preamble of the statute the Legislature have declared that they thought it "*desirable to soften the rigor of the laws*" affecting the relation between debtor and creditor as far "*as a due regard to the interest of commerce will permit.*"

This declaration sufficiently shows, and I believe it is generally admitted, that the intention of the Legislature in passing the 12th Vic., cap. 42, was, *not* to deprive insolvent debtors of the means which the laws previously in force afforded them of avoiding imprisonment for debt, *by giving bail*; but, on the contrary, to afford to insolvent debtors, suffering imprisonment *for want of bail*, the means of recovering their liberty, on giving up their estates for the benefit of their creditors.

That such was the intention of the Legislature, is I think very plain from the whole tenor of the act; but more particularly from the provisions contained in the 12th section.

In order, however, to see that section in its true light, it is necessary to keep in mind the general bearing of the other sections of the statute. I shall therefore briefly allude to them.

The 1st and 2nd sections determine in what cases a

writ of *capias ad respondendum* may issue; and, also, do away with the writ of *capias ad satisfaciendum*.

The 4th and 5th sections authorize proceedings by means of which any debtor arrested under a *cap. ad resp.*, upon filing a statement of his assets and liabilities, and giving up his property, may, after a certain time, obtain his liberation from jail, without paying the debt for which he was arrested, or giving security of any kind.

The 6th and 7th sections provide for the sale of the property given up under the other provisions of the act.

The 8th section makes provisions for debtors not arrested by *capias ad respondendum*, but who, were it not for the passing of the act, could be proceeded against by *capias ad satisfaciendum*, and affords to those persons, also, on giving up their property, the means of obtaining their discharge from imprisonment.

The 9th and 10th sections have reference to persons arrested before the passing of the act.

The 11th section declares that the discharge of the person of a debtor, under the statute, shall not extinguish his debts.

Then we arrive at the 12th section, upon which the present case turns, and which, I propose to give at full length, without referring to the remaining five sections of the statute, which have no bearing upon the present case.

Section 12, is as follows:

“ And be it enacted, that nothing in this act contained
 “ shall prevent any person arrested under a writ of *capias*
 “ *ad respondendum*, from putting in special bail to the ac-
 “ tion, as permitted by the laws of Lower Canada now in
 “ force, excepting only that such special bail shall not be
 “ received unless put in on the return day, or at any time

“ before the return day, or within the eight days next after
 “ the return day ; provided always, that it shall be in the
 “ power of the Court, upon special application and sufficient
 “ cause shewn, to extend the time for putting in such
 “ special bail ; and it shall also be in the power of the
 “ Court, upon special application and sufficient cause
 “ shewn, to allow any defendant arrested, and who shall
 “ have given bail for his appearance at the return of the
 “ writ, to put in security that he will surrender himself as
 “ provided by the third section of this act, even after the
 “ period in that behalf prescribed by the said third section
 “ of this act. ”

Thus we see that the Legislature, after having, by the first two sections of the statute, declared in what cases a writ of *capias ad respondendum* may be sued out ; then by the next nine sections provided means, by the observing of which any debtor arrested under a *capias ad respondendum*, can, on giving up his property, regain his liberty ; although the claim for which he may have been arrested remain unsatisfied.

The Legislature have by these provisions, as they intended, very materially “ softened the rigor ” of the law as regards that class of debtors who were liable to be confined in prison for want of bail ; but there was another, and every lawyer knows, a much more numerous class of debtors, who previously to the passing of the act, had the means of avoiding imprisonment by giving *special bail to the action* ; and, as it certainly was not the intention of the Legislature to make the *more numerous* class of debtors suffer, in order to afford indulgence to another, and less numerous class, the framers of the statute, true to the intention of *softening the rigor* of the law proclaimed in the preamble—caused the nine sections of the statute, (from 3 to 11 inclusively,) which afford relief to one class of debtors, to be followed by the twelfth section, which prevents the

previous sections from increasing the severity of the law, as against *any class* of debtors.

Were it not that a contrary opinion is entertained by persons for whose views I have the highest respect, I should think it beyond doubt that, under the 12th section of the 12th Victoria cap. 42, a debtor arrested has now a right to put in special bail, *exactly as he could have done*, and with *precisely the same effect*, as if that statute had never been passed ; excepting of course that by the proviso in that section, the time for putting in such special bail is limited.

What other meaning, I ask, can be given to the words, "tha' nothing in the act contained, shall prevent *any person* "arrested, under *any writ of capias ad respondendum*, from "putting in *special bail to the action, as permitted by the "laws of Lower Canada, now in force,*"—the law then in force and applicable in such cases, being, as shown by Mr. Justice Caron, and, as is quite certain, the 5th George IV, cap. 2.

Do we not see that the Legislature in one part of the section speak of "*special bail to the action* ; " a proceeding which, for centuries, has been familiar to all english lawyers—and that towards the close of the section, the Legislature speak of "*security to surrender* " "as provided "by the third section of this act ; " a proceeding established for the first time by the act itself.

Do we not, also, see that the Legislature have thought fit in one part of the section to limit, subject to a proviso, the time within which *special bail to the action* is to be put in, and, in another part of the same section, to limit, subject to a proviso, the time in which *security to surrender* "*under the third section of this act* " is to be given. How then can we be asked to hold, as I understand we are, that the old proceeding of "*special bail to the action* and the

new proceeding *security to surrender* " under the third section of the act, are, in effect, one and the same proceeding—or, at any rate, that a defendant arrested under a writ of *capias ad respondendum* cannot now put in *special bail* to the action, as he could have done before the passing of the statute.

It may however be said, and, indeed, has been said, that although the Legislature have declared that special bail to the action may be put in, yet that they have not said that such special bail shall be received *instead* of *security to surrender*, as provided by the third section of the statute, or that special bail shall have the effect of discharging the bail to the sheriff. But in my opinion such a declaration was altogether unnecessary.

The Legislature having expressly reserved to a debtor arrested the power of putting in special bail, and having given the Court the power of enlarging the time allowed for that purpose, did not mean, and could not by any possibility have meant, that the putting in of such special bail should be an idle purposeless formality—on the contrary, the special bail which the Legislature have thus permitted to be put in, must have the legal effect which such bail always had, namely : that of *discharging the bail to the sheriff*.

As this part of the case, according to my view, is sufficiently plain, I shall now pass to the consideration of some of the points to which our attention was particularly drawn in the course of the argument before us.

It was contended by the respondent that after final judgment rendered in the original suit, the Court had no longer power to allow bail to the put it.

But there is not one word in the statute tending to subject the powers of the Court to the limitation thus contended for—and it is plain that if this pretension of the respondent be well founded, it would follow, that if a defendant

thought fit to confess judgment, the parties to the suit might, even during the eight days allowed by the statute, deprive the bail to the sheriff of any opportunity of applying for an extension of the time to put in special bail.

It was also argued that the application to extend the time for putting in special bail ought to have been made before that delay had elapsed, and that after that time had gone by, the Court had *no power* to allow special bail to be put in. This objection was strongly urged and formally overruled in Campbell and Atkins; and in addition to the reasons given by Mr. Justice Caron, in that case, I may observe that the interpretation which the respondents wish us to put upon the proviso in the 12th section of the 12th Victoria, cap. 42, is contrary to the interpretation which our Courts have invariably put upon other provisions of law of the same character.

For instance, in the 25th section of the 12 Victoria, cap. 38, it is declared; "the defendant shall be allowed *eight clear days* from the appearance to plead to the declaration;" and in the next section, it is declared "that the delay for pleading *may be enlarged* by the Superior Court, or by any Judge thereof, on special application." Now I am not aware that it has ever been held, or even contended, that an application to *enlarge* the time to plead, must be made within the statutory delay of eight days, and we know that the uniform practice of all the Courts is against such a pretension. I may, as to this point, add, that if the view now being considered be well founded, then, if the bail to the sheriff were prevented even by sudden sickness, or by the fraud of the plaintiff, from asking for an enlargement of the delay within the eight days allowed by the statute, the Court would be *without power* to afford them relief.

The respondents, naturally anxious to take this case out of the ruling in Campbell and Atkins, have said that the present case differs entirely from Campbell and Atkins, in-

asmuch as, in that case, "the permission of the Court had been granted to the defendant, *upon his application*, while "here *he* has made *no application*."

The difference thus pointed out between the present case, and the case of Campbell and Atkins, is unimportant, because it is indisputable that bail to the sheriff have a right to put in special bail for their own protection. Petersdorff (1) expressly says so at p. 282, and, at the close of the same page, the author adds "and it is now a settled principle that the *bail below* may appear and justify by their own attorney."

The objection urged at the argument, that the appellants are not parties in the original suit does not seem to me of importance, because it is sufficient for the appellants to show that they are aggrieved by the judgment of which they complain.

Upon the whole, the case seems to me to be, in principle, the same as the case of Campbell and Atkins; and believing, as I do, the judgment in that case to be in all respects well founded, I think that the judgment now under consideration, which is opposed to it, must be reversed.

The judgment is as follows :

Considering that by the law in force in Lower-Canada a defendant who has been arrested by virtue of a writ of *capias ad respondendum* issued out of a Court of competent jurisdiction in Lower Canada aforesaid, and who has given bail to the sheriff for his appearance at the return of the said writ, may put in special bail or security at any time, upon special application therefor to the Court out of which such writ issued, upon sufficient cause shewn to the satisfaction of the said Court for extending the time of putting in such bail; considering that by the law aforesaid the condition of the recognizance of the said bail or security is that the cognizors thereof shall not become liable unless the defendant

(1) Petersdorff on Bail, p. 282.

shall leave Lower-Canada aforesaid, without having paid the debt, interest and costs for which the action shall have been brought ; considering that the bail to the sheriff given by such defendant arrested as aforesaid, have by law a right to put in such bail or security aforesaid, upon the failure or default of such defendant to put in the same ; considering that in the judgment pronounced by the Superior Court for Lower-Canada, sitting at Sherbrooke, on the 14th day of March, 1863, rejecting the petition and application of the said appellant, petitioner in the Court below, to put in bail and security for the said De Courtenay, the defendant in the Court below, in the action referred to, and mentioned in the said petition, the said action instituted by the said respondents, plaintiffs in the Court below, against the said defendant, and in which the said respondents, plaintiffs aforesaid, obtained judgment from the said Court below, against the said defendant, there is error ; this Court doth reverse and set aside the said judgment, and proceeding to render the judgment which should have been pronounced by the said Court below upon the said petition and application of the said petitioner, doth maintain the same, and doth order that the said petitioner shall be at liberty at any time of the first regular session of the said Superior Court at Sherbrooke aforesaid, sitting after one month from the pronouncing of this judgment, to put in before the said Court special bail or security to the satisfaction of the said Court, for the said De Courtenay, defendant aforesaid, the condition of the recognizance therefor to be that the said bail or security shall not become liable unless the said defendant shall leave Lower-Canada without having paid the debt, interest and costs for which the said judgment has been rendered against him at the suit of the said respondents, plaintiffs aforesaid, &c.

ANDREWS and ANDREWS, for appellant.

SARBORN and BROOKS, for respondent.

BANC DE REINE, } DISTRICT DE MONTREAL.
 EN APPEL. }

Présents :—DUVAL, MEREDITH, MONDELET et BADGLEY,
 Juges.

LEFEBVRE DE BELLEFEUILLE, *et al*..... Appelants.
 et
 GLOBENSKY, *et al*..... Intimés.

Jugé :—Que dans un partage de fief, avec stipulation que les revenus d'un moulin construit sur la part d'un des co-partageants se partageraient suivant leurs parts respectives, jusqu'à ce que le propriétaire du fonds eût remboursé à son co-partageant la valeur de sa part dans le dit moulin; ce dernier a droit de réintégrande pour être remis en possession de son droit de percevoir sa part des revenus du dit moulin, le propriétaire du fonds ne lui ayant pas remboursé la valeur de sa part de tel moulin.

Held :—That in the partition of a fief, with condition that the revenue of a mill built upon the share of one of the co-partitioners should be divided according to their respective shares, until the proprietor of the ground should have reimbursed to his co-partitioner the value of his share in the said mill; the latter has a right of action to be put in possession of his right to receive his share of the revenues of the said mill, the proprietor of the ground having failed to repay him the value of his share of such mill.

Jugement rendu le 1er mars, 1864.

L'appel était instituée d'un jugement rendu comme suit par la Cour Supérieure, Montréal :

"The Court, &c. Considering that in the *Acte d'accord pour tenir lieu de partage entre les deux familles Dumont et De Bellefeuille de l'augmentation de la seigneurie des Mille-Isles*, referred to in the pleadings produced in this cause as defendants exhibit number four, dated twenty-seventh december, one thousand eight hundred and forty-three, and passed before Globensky, and colleague, notaries public, the following clause occurs, and is therein and thereby agreed upon as part of said *Acte d'accord* : " *Quant aux moulins qui se trouvent par la ligne commencée; être érigés sur la partie échue à la famille Dumont, il est entendu que les revenus du moulin à farine resteront en communauté, c'est-à-dire, que la famille Dumont en percevra les deux tiers, et la famille De Bellefeuille le troisième tiers, jusqu'à ce que la famille Dumont rembourse à la famille De Bellefeuille, le tiers de*

" la valeur des dits moulins, et ses ustensiles, tournants et tra-
 " vaillants, au dire d'experts choisis par les dites familles Du-
 " mont et De Bellefeuille, et que le moulin à scie restera au
 " profit de la famille De Bellefeuille jusqu'à ce que la famille
 " Dumont lui ait remboursé et payé la valeur de la dite bâ-
 " tisse, et ses dépendances, aussi au dire d'experts choisis par
 " les dites familles De Bellefeuille et Dumont : Considering
 " that by law the breach of such stipulation does not render
 " the said defendants liable to be impleaded by an action
 " *en réintégrande*: Considering, moreover, that it appears by
 " the evidence adduced, and by the admissions contained
 " in the plaintiffs' declaration, that no *partage* of the mill,
 " premises and dependences mentioned in the plaintiffs'
 " declaration, had ever been made, entered into or effected
 " by the said plaintiffs and the said defendants, or by their
 " predecessors, *auteurs* : Considering on the contrary that it
 " results from the evidence adduced that the said mill,
 " premises and dependences, mentioned and described in
 " the plaintiffs' declaration, were at the time of and previous
 " to the institution of the present action, the property of the
 " said plaintiffs and the said defendants, and were by them
 " held *par indivis*, and the revenues thereof were to be
 " divided into the proportions, and appropriated as in and
 " by the said *acte d'accord* was agreed upon ; and, moreover,
 " considering that by the *bornage* and division of the con-
 " tinuation of the said seignior of Mille-Isles, it appears
 " that the mill in question is built upon and is situated
 " upon that part of the continuation of the said seignior
 " which belongs to the said defendants, in pursuance of
 " said *bornage* and division. Seeing, therefore, that no action
 " such as that instituted by the plaintiffs against the defen-
 " dants in the present instance, would or can by law be
 " maintained against defendants, for the causes, matters and
 " things set forth and contained in the plaintiffs' declaration :
 " Considering that the plaintiffs have failed to prove the
 " material allegations of their declaration, and that the
 " defendants have established by legal and sufficient evid-
 " ence the averments of the plea, *exception péremptoire* by

“ them filed and pleaded in this cause, and that the said
 “ pleas styled *exceptions péremptoires*, are well founded in
 “ fact and in law, doth maintain the said pleas of the said
 “ defendants, and doth dismiss the plaintiffs’ action with
 “ costs.

MONDELET, Juge, dissente.—Après avoir lu tous les documents, pièces et preuve, je n’hésite aucunement à exprimer mon opinion, que les appelants n’avaient aucun droit d’intenter contre les défendeurs une action en réinté-grande, attendu qu’il a été constaté que le moulin à farine dont il est question, est situé dans la partie de l’augmentation de la Seigneurie des Mille-Isles, qui est, par le partage qui a suivi l’acte d’accord du 27 décembre, 1843, et l’opération de Laurier arpenteur, dans le lot des défendeurs, les appelants n’ont eu aucun droit ni au fonds, ni à la possession, du moulin en question. Les demandeurs n’ont droit qu’à un tiers des revenus, ce qui n’a aucun caractère de droit à la réalité, mais donne lieu, tout au plus, à une action personnelle contre les défendeurs pour le tiers des revenus du moulin si ces derniers sont en défaut d’accomplir, à cet égard, leurs obligations envers les demandeurs.

Je pense donc que l’action des demandeurs a été bien et dûment déboutée, par le jugement bien motivé de la Cour de première instance, qui devrait être confirmé.

BADGLEY, Justice, giving the judgment of the Court.—By the will of the late M. Dumont, proprietor of the Seigniorie of Mille-Isles and the continuation thereof, dated 11th October, 1805, he devised that property to his son and daughter, with substitution to his grand and great grand children, and directed it to be divided between them according to law by arbitrators to be appointed by the devisees. At the outset it is proper to state that the respondents, defendants, represent the descendants of the *grevé*, the son, and known as the Dumont family, and the appellants, the plaintiffs, those of the daughter *grevée*, and known as the De Bellefeuille family.

On the 4th of July, 1807, agreement to effect partition was executed, and arbitrators were named.

On the 4th and 5th January, 1808, the award of arbitrators was rendered, whereby among other things, the continuation of the Seignioriness was divided into two portions respectively of $\frac{2}{3}$ and $\frac{1}{3}$, the former for the Dumont family, the latter for the De Bellefeuille family, the former, the lands to the N. E. with $\frac{2}{3}$ of the domain, namely 8 arpents in front by 30 in depth, with all the buildings erected on this portion, and the latter the lands to the S. W. with $\frac{1}{3}$ of the domain, namely, 4 arpents in front by 30 in depth, with all buildings erected on said latter portion.

In an action of partition in which the two interested families were represented, a judgment by consent was rendered on the 12th October, 1839, which ordered the division line between the two portions to be established by a surveyor, and Laurier was named therefor.

The surveyor proceeded with his operation and drew the line to some extent in the said continuation of seignioriness, when, on the 27 December, 1843, by deed of agreement, the parties having declared their intention to have and enjoy their respective portions apart and separate, adopted the division line commenced by Laurier, in its then extent, and agreed that it should be extended to the seigniorial line, and at the same time recognized the family portions of $\frac{2}{3}$ to the N. E. of the line, and $\frac{1}{3}$ to the S. W. of the line, as directed by the award.

It was also specially agreed between them as part of this final settlement of their respective portions, and the following clause occurs and is therein and thereby agreed upon, as part of said *acte d'accord* : *Quant aux moulins qui se trouvent par la ligne commencée, être érigés sur la partie échue à la famille Dumont, il est entendu que les revenus du moulin à farine resteront en communauté, c'est-à-dire, que la famille Dumont en percevra les deux tiers, et la famille De Belle-*

feuille le troisième tiers, jusqu'à ce que la famille Dumont rembourse à la famille De Bellefeuille le tiers de la valeur des dits moulins, et ses ustensiles, tournants, et travaillants, au dire d'experts choisis par les dites familles Dumont et De Bellefeuille, et que le moulin à scie restera au profit de la famille De Bellefeuille, jusqu'à ce que la famille Dumont lui ait remboursé et payé la valeur de la dite bâtisse, et ses dépendances, aussi au dire d'experts choisis par les dites familles De Bellefeuille et Dumont.

On the 16th September, 1844, Laurier completed the *bornage* by the prolongation of the line previously commenced by him to the line of the seignior, as shewn in his *procès-verbal*.

- From this time the two families *appear to have held* the flour mill jointly, and to have taken and received the revenues harmoniously according to their respective proportions, until 21st January, 1856, when a protest was made by the Dumont family against the De Bellefeuille family,
- alleging that by reason of the refusal of the latter to name *experts* to value the flour mill, the former tendered to the latter a sum of money as the $\frac{1}{3}$ of said value, required the latter to appoint and agree upon *experts* to establish the valuation, and on their default so to do, within 15 days, that the former would withhold the entire revenues of the mill from the latter.

On the 21st May, 1856, the miller, Marie, having by the defendants' directions refused to pay over to the plaintiffs their usual share of the revenues, the defendants having assumed the entire control of the flour mill, the plaintiffs protested against the miller, requiring him to render account of the revenues of the mill from the 8th March then last, and on the 29th May, 1856, the plaintiffs protested the defendants &c., requiring them to meet the plaintiffs in the mill on the 3rd June following, to establish their division of the revenues, and to intimate their insistence upon entrance into the mill.

Nothing came of these protests and counter protests,

except the usual result, a suit at law, instituted by the plaintiffs against defendants, in which the former allege their possession of the mill *par indivis* with the defendants, receiving therefrom $\frac{1}{3}$ of its revenues, that they were troubled in their possession by the defendants ; which possession they had held for more than 10 years to the 21st January, 1856, of $\frac{1}{3}$ thereof—and that the trouble was done within a year and day of the institution of the suit—wherefore they prayed the ordinary conclusions of a possessory action, the maintenance of their possession, the cessation of the trouble, and £200 damages.

The pleading of the defendants is substantially petitory, title under the will and agreement above detailed, claiming absolute sole property in the mill in question, and alleging their sole possession of it, finally objecting that the special agreement in the *acte d'accord* was not a real right in the mill or its revenues, but only personal, for a division of the latter—wherefore *actio non*.

It is in evidence that the plaintiffs were in possession of the mill on the 21st January, 1856 ; that several years before the plaintiffs and defendants together joined in a *contrat* of engagement with Marie the miller, whereby he was to work the mill for them, receive the revenues and pay them proportionally to the respective parties ; that the miller had acted under that engagement for five years ; that before said date, 21st January, the plaintiffs had always been in the peaceable possession of the said mill, as co-proprietors with the defendants, receiving their share of revenue, when about that time the defendants ordered the miller to pay no more of the revenues to the plaintiffs as before, which he obeyed, the defendants assuming the entire control, declaring that the plaintiffs *n'avaient plus d'affaire dans le moulin*.

It is elementary to say that a partition of realty effected and completed by the definition of limits and boundaries, makes the previous proprietors *par indivis* separate proprietors of their respective portions, as settled by the terms of

their deed of partition, namely, the agreement or *acte d'accord*; in this case, which related back the several titles of the parties to the common title under which they jointly held the property. It would notwithstanding be subject to the legal effect of any special stipulation or condition contained in the *acte* whereby the entire separate portion, or any part thereof, might be affected, controled or limited in possession or enjoyment by the party to whom it had fallen by the agreement or *accord*. Without such a special reservation or limitation, the possession would necessarily have been as absolute as the title, but with such a special agreement in the *acte d'accord for the partition generally*, it specially regarded the flour mill, and therefore it is necessary to ascertain its legal effect in connexion with the circumstances of the case, as shewn in evidence and affecting the defendants.

Now, the *acte d'accord* between the parties did establish the partition of the respective lots, but, at the same time, it declared that as to the mills, which by the line had been found to be erected upon the portion fallen to the Dumont family, it was agreed that the revenues of the flour mill *resteraient en communauté*, shall continue in common, that is to say, the Dumont family *percevera*, shall take and receive $\frac{2}{3}$, and the De Bellefeuille the other $\frac{1}{3}$ until &c. and that the saw mill *restera au profit de la famille De Bellefeuille*, shall continue for the sole profit of the De Bellefeuille family until &c., in both cases, the happening of certain conditions, namely, not only the ascertainment of the experted values of the two mills, but still more, the actual payment by the Dumont family to the De Bellefeuille family of $\frac{1}{3}$ of the value of the flour mill property, and the entire value of the saw mill property.

The legal interpretation of the special stipulation is in itself; the effective words of the stipulation are in the continuance of the possession and enjoyment which the plaintiffs, at the date of the *acte d'accord*, had jointly with the defendants in the flour mill until the accomplishment of the sti-

culated conditions, as to the value of the property respectively ; and the same stipulation which continued to the plaintiffs the entire possession of the saw mill for their sole profit, continued to them the joint possession of the flour mill for their perception of the 1/3 of its revenues. It is not easy to discover a different application of this legal limitation of property as it relates to the flour mill, than as it relates to the saw mill.

Where parties agree to take and receive the revenues of real property according to certain proportions for each, without any stipulation as to the possession by either, of the common producer, they hold as joint tenants in possession, each having a *jus in re* to the extent of his share ; and so, in this case, the parties themselves so considered their possession, because Marie asserts that they mutually engaged him to take charge of the flour mill, the common object, and to receive for them their common revenues.

“ Les fruits de la chose possédée sont divisibles ; mais cette division matérielle des fruits n'est possible qu'après que les fruits ont été recueillis ; jusque-là, la possession a été fait commun, s'appliquant à toute la chose commune, et à chaque partie de cette chose : la possession quand la part de chacun n'est pas matériellement faite est donc une chose essentiellement indivisible. (1)

The right of the plaintiffs truly is not that of absolute proprietor, but it is that of : “ Possesseurs précaires, qui jouissent “ en vertu d'une concession, mais qui ne dépouillent pas absolument le propriétaire, et laissent entre ses mains un “ droit supérieur que le concessionnaire doit respecter, &c. “ Cependant, il ne faut pas prendre à la lettre ces termes de “ la loi, à titre de propriétaire, à titre non précaire, pour en “ conclure que les possesseurs dont on vient de parler ne “ peuvent exercer l'action possessoire : pour être privé de “ cette action il faut n'avoir aucun droit réel dans la chose. “ Il n'en est pas de même de l'usufruitier, de l'usager, du

(1) Caron, Actions Possessoires, pp. 812, 813.

“ possesseur d’une servitude légale ou conventionnelle,
 “ &c. Ceux-ci ne possèdent pas, il est vrai, comme pro-
 “ priétaires absolus ; ne pourraient agir au possessoire pour
 “ se faire maintenir dans la possession à titre de propriété,
 “ mais ils n’en ont pas moins un droit dans la chose, *jus in*
 “ *re* ; la propriété est démembreée à leur égard, en quelque
 “ sorte, et tout en reconnaissant un droit supérieur, ils ne
 “ sont pas moins admis à l’action possessoire, &c.”

Curasson has extracted the above almost entirely from Troplong, *Traité de Prescription*, and adds : “ la posses-
 “ sion se continue telle qu’elle était à son principe : que c’est
 “ par son origine que sa qualité demeure fixée, et que nul
 “ ne peut s’en changer la cause à lui-même,” and Troplong
 himself admits that this possession, *jus in re*, “ est chez
 “ nous une opinion la plus *répandue* : elle est enseignée
 “ par MM. Poncet et Duranton ; on la trouve dans tous les
 “ livres et dans tous les arrêts. Domat, guide assez ordi-
 “ naire de nos auteurs modernes, en est le partisan, &c.”
 but notwithstanding he combats all this legal host, this
 universal *jurisprudence*, and asserts that it is a *mere fact*,
 and yet after exhibiting his usual *controversialism* against
 every legist and every *arrêt*, he concludes : “ maintenant si
 “ l’on nous demande dans quelle classe nous rangeons les
 “ actions possessoires, nous répondrons sans hésitation et
 “ sans scrupule, que nous les considérons comme dans la
 “ famille des actions réelles,” Troplong, *Prescription* ;
 and Caron, *Actions Possessoires*, p. 811, says : “ notre
 “ droit n’admet pas les subtilités du droit romain, et la Cour
 “ de cassation a toujours admis la complainte dans le cas
 “ de possession commune, cela nous paraît exact. Ainsi,
 “ si deux co-héritiers, propriétaires d’une maison qu’ils se
 “ sont divisée, sont convenus de jouir en commun de la
 “ Cour qui en dépend, et que l’un d’eux soit troublé par
 “ l’autre dans cette possession commune, il pourra se
 “ plaindre ; car quelle que soit l’étendue, la nature de sa

(1) Curasson, *Actions Possessoires* p. 97 et suiv.

" possession exclusive ou commune, du moment qu'en fait
 " elle existe, s'il est troublé dans cette possession, il doit
 " être admis à demander qu'on le maintienne dans son
 " droit de possession; tel qu'il l'exerçait; et c'est avec raison
 " que la Cour de cassation a décidé qu'il pourrait en ce
 " cas intenter l'action possessoire contre son co-possesseur
 " qui le trouble, ou qui essaie de s'attribuer la posses-
 " sion exclusive de la chose commune," and the same
 author says, at p. 812. " En principe, l'action possessoire
 " ne peut appartenir qu'à celui qui a la pleine disposition de
 " la chose, qui est maître de la chose. Mais il est de prin-
 " cipe aussi que chaque propriétaire d'une chose indivisible
 " peut intenter toutes les actions relatives à cette chose,
 " comme un seul est tenu pour tous. La question est donc
 " de savoir si la possession d'une chose indivise est une chose
 " indivisible. L'article 1217 du code civil répute indivisible
 " la chose qui dans sa livraison ou le fait qui dans l'exécu-
 " tion n'est pas susceptible de division, soit matérielle, soit
 " intellectuelle. Or, cela peut-il se dire de la possession ?
 " Les fruits de la chose possédée sont divisibles; mais cette
 " division matérielle des fruits n'est possible qu'après que
 " les fruits ont été cueillis; jusque là la possession a été un
 " fait commun, s'appliquant à toute la chose commune, et à
 " chaque partie de cette chose; la possession, quand la part
 " de chacun n'est pas matériellement faite, est donc une
 " chose essentiellement indivisible. "

Savigny, Traité de la Possession, p. 570. " Toute construc-
 " tion est considérée comme partie du sol sur lequel elle re-
 " pose, et sa propriété comme sa possession, sont intimement
 " liées à la propriété et à la possession du sol. La seule
 " séparation possible consiste en une espèce particulière de
 " *jus in re* que le propriétaire peut transmettre à un autre.
 " Celui qui a ce *jus in re* n'est pas plus possesseur que pro-
 " priétaire de la maison, mais il a une *juris quasi possessio*,
 " et par là les actions possessoires. Cette *juris quasi posses-*
 " *sio*, a une très grande ressemblance avec la possession des
 " servitudes personnelles, parce que, comme celle-ci, elle

“ dépend de la possession naturelle de la chose elle-même.
 “ Il n'existe aucune différence quant à l'acquisition et à la
 “ perte de la possession, et en existât-il dans les interdits,
 “ elle n'est du moins pas pratique. ”

The right of possession of the plaintiffs under the circumstances of the case, whether it be a mere fact or of law, whether settled and stipulated for by the *acte d'accord* as a limitation of the full and absolute property in the mills, until the arrival of the contingency of their experted values of those properties being ascertained, and the completion of that contingency by the payment of the agreed values by the Dumont family to the De Bellefeuille family, or whether considered legally as a *jus in re*, according to the current of legists and of *jurisprudence*, was in the plaintiffs a *jus in re* in the flour mill in question in this case, which they had substantially possessed and enjoyed before and at the date of the *acte d'accord*, December, 1843, and which under that accord they continued to possess until the defendant's trouble in January, 1856. That possession was manifestly sufficient to give them possessory rights, and to enable them to maintain them by a possessory action, and although the case does not present the features of absolute divestment required to sustain an action of *réintégration*, as considered by the judgment of the Superior Court, it does possess the attributes and privileges of an action *en complainte*, and therefore the absolute dismissal of this action does appear to be incorrect.

The Court &c., Considering that on, and for many years previous to, the 27th day of december, 1843, to wit, the date of the said notarial *acte* filed in this cause, namely, the *acte d'accord pour tenir lieu de partage entre les familles Dumont et De Bellefeuille, de l'augmentation de la seigneurie de Mille-Isles*, referred to in the declaration and pleadings in the cause filed, the said families of Dumont and De Bellefeuille were the legal owners and possessors *par indivis* of the said augmentation, which, under and by virtue of the stipu-

lations contained in the said notarial *acte*, the said two families did agree to divide and partition among them, according to their respective rights under and by virtue of the will of the late Louis Eustache Lambert Dumont their common ancestor and deviser. And considering that it was specially and expressly stipulated by the said families, parties thereto, now represented by the respective parties in this cause, to wit, the Dumont family represented herein by the respondents, defendants in the Court below, and the De Bellefeuille family, by the appellants, plaintiffs in the Court below, in manner following ; that is to say : “ Quant
 “ aux moulins qui se trouvent par la ligne commencée être
 “ érigés sur la partie échue à la famille Dumont, il est
 “ entendu que les revenus du moulin à farine resteront en
 “ communauté, c’est-à-dire, que la famille Dumont en per-
 “ cevra les deux tiers, et la famille De Bellefeuille, le troi-
 “ sième tiers, jusqu’à ce que la famille Dumont rembourse
 “ à la famille De Bellefeuille le tiers de la valeur des dits
 “ moulins, et de ses ustensiles, tournants et travaillants au
 “ dire des experts choisis par les dites familles Dumont et
 “ DeBellefeuille, et que le moulin à scie restera au profit de
 “ la famille De Bellefeuille jusqu’à ce que la famille Dumont
 “ lui ait remboursé et payé la valeur de la dite bâtisse et
 “ ses dépendances, aussi aux dire des experts choisis par les
 “ dites familles De Bellefeuille et Dumont.”—Considering that in and by the said special stipulation and agreement above mentioned the said De Bellefeuille family, to wit, the said appellants, had in law the possession of, and a possessory right, *jus in re*, in and to the one undivided third part of the said flour mill in the said special stipulation mentioned, the object of contestation in this cause, wherein the said appellants could not legally be troubled, *troublés*, and whereof they could not legally be divested by the respondents, representing as aforesaid the Dumont family, except after the entire fulfilment of the condition in respect of the said flour mill stipulated in the said special agreement, or by a judgment rendered therefor by a Court of competent ju-

risdiction :—Considering that the said respondents did, on the 21st day of January, 1846, illegally and wrongfully trouble, *troublé*, the said appellants in their lawful possession of the said one undivided third part of the said flour mill, and did illegally and wrongfully dispossess and divest them of their said possession and possessory right therein :—Considering that the said possession and possessory right of the said appellants was sufficient in law for the maintenance of their possessory action by them in this cause instituted against the said respondents :—Considering that the appellants have a right to have and receive the one third part of the revenues of the said flour mill so long as their said possession and possessory right shall exist :—Considering that in the judgment pronounced by the Superior Court of Lower Canada, at the City of Montreal, on the 20th day of June, 1861, whereby the said action of the appellants, plaintiffs aforesaid, has been dismissed, there is error :—This Court doth reverse and set aside the said judgment, and proceeding to render the judgment which the Court below ought to have rendered, doth maintain the said action of the said appellants, plaintiffs in the Court below, against the said respondents, defendants in the Court below, and doth declare that the said appellants, plaintiffs aforesaid, are and were the legal possessors of, and had a possessory right in, the one undivided third part of the said flour mill situated at St. Jerome, on the North River, in the village and parish of Saint Jerome, in the said seigniory of Mille-Isles, mentioned and described in the said declaration in this cause filed, and inasmuch as the said respondents did, on the 27th day of January, 1856, illegally and wrongfully trouble, *troublé*, the said appellants, in their said possession and possessory right aforesaid, and did illegally and wrongfully dispossess and divest them thereof, the Court doth order the said respondents, defendants aforesaid, to render and restore to the said appellants, plaintiffs aforesaid, the full and entire possession of the said one undivided third part of the said flour mill, within

twenty days after service upon the respondents, aforesaid, of this judgment, and upon their failure so to do, that the said rendering and restoration to the said appellants of the said possession, shall be effected in manner provided by law, and that the respondents, defendants aforesaid, thereafter do not trouble, *troubler*, or molest the said appellants, plaintiffs aforesaid, in their said possession, and possessory right of the same ; and the Court doth further order, for the purpose of ascertaining the amount of the said revenues, which the said appellants, plaintiffs aforesaid, are justly entitled to have and receive from the respondents, defendants aforesaid, up to the time of the service of the said judgment, that by *experts* to be named and appointed by the said appellants, plaintiffs aforesaid, and respondents, defendants aforesaid, respectively, within twenty days from and after the signification by the one upon the other of the said parties, of this judgment, and on failure and default of one or both of the said parties so to do, then by the said Superior Court, or a Judge thereof, with power to the said two *experts* to name a third in case of difference of opinion between the two, the net revenues of the said flour mill shall be ascertained and established in presence of the said parties, or them duly called therefor, and the one third part thereof belonging to the said appellants, plaintiffs aforesaid, shall be settled and determined, and shall by the said *expertise* be awarded to the said appellants, plaintiffs aforesaid, and the said *experts* shall make and render to the said Superior Court, their said report in the premises, without delay, to be then proceeded upon by the said Superior Court, as to law and justice shall appertain, with costs, &c.

STUART, HENRY, for appellants.

CARTIER and POMINVILLE, for respondents.

QUEEN'S BENCH, }
APPEAL SIDE.

DISTRICT OF QUEBEC.

Before : — AYLWIN, DUVAL, MEREDITH, MONDELET and
BERTHELOT, Justices.

No. 18. { LLOYD..... Appellant.
 { and
 { BOSWELL, et al..... Respondents.

Held :—10. That in an action en licitation, the plaintiff, the proprietor of one half, having concluded for a *partage* between himself and the two defendants, the co-proprietors of the other half, the defendants having separately acquiesced in these conclusions, and a judgment having been rendered in accordance therewith, the experts appointed to establish the divisibility or otherwise of the property, must confine themselves to reporting whether the property can or cannot be divided into two portions, the question of a further division between the defendants not having been raised.

20. That in such action, where two experts have been appointed to report on the divisibility or otherwise of a property, and where they have not agreed in the *expertise*, one reporting the property divisible, and the other indivisible, the appointment of a third expert by the Court, *nommé d'office*, to decide between them must be made.

Jugé :—10. Que dans une action en licitation, le demandeur, propriétaire d'une moitié, ayant conclu à un partage entre lui et les deux défendeurs, les co-propriétaires de l'autre moitié, les défendeurs ayant séparément acquiescé à ces conclusions, et un jugement ayant été rendu en conformité à icelles, les experts nommés pour constater la divisibilité ou l'indivisibilité de la propriété, doivent seulement faire rapport savoir si la propriété peut ou ne peut être divisée en deux portions, la question d'une division ultérieure entre les défendeurs n'ayant pas été soulevée.

20. Que dans telle action, lorsque deux experts ont été nommés pour faire rapport sur la divisibilité ou indivisibilité d'une propriété, et dans le cas où ils ne se sont pas accordés sur l'expertise, l'un rapportant que la propriété est divisible, et l'autre qu'elle est indivisible, la nomination d'un tiers expert par la Cour, *nommé d'office*, est nécessaire afin de les départager.

Judgment rendered on the 16th day of March, 1863.

The appeal in this cause was from a judgment rendered by the Superior Court at Quebec, homologating the report of one *expert*, and rejecting that of the other, there being but two *experts* appointed. In December, 1861, the appellant instituted his action for the licitation of a certain property owned *par indivis*, one half by himself, and the other half by the respondents, who had acquired the same as joint *adjudicataires* at a judicial sale.

The respondents acquiesced in the demand for a licitation, and judgment was rendered as follows : " The Court having seen, &c : Doth declare the said parties to be proprietors, *par indivis*, to wit : the said plaintiff of one half,

and the said defendants of the other half of the said immoveable property ; and for the purpose of the division thereof, required in and by the present action, doth order that the same be viewed and examined by one or more *experts*, to be named by the parties, respectively, within three days from the notice so to do, and in default thereof, *nommés d'office* by the Court, or by a Judge thereof in vacation, which said *expert* or *experts* shall report whether the said immoveable property can or cannot be divided into portions corresponding to the rights of the said parties, or in what manner partition can be made and if with *soulte*, and should such *expert* or *experts* report that the same cannot be divided advantageously to the interests of the parties ; the Court doth futher order that the said lot of ground and premises, including fixtures and machinery as above described, be sold by licitation *en justice* according to law, and that the proceeds thereof be paid in due course to the said parties according to their respective shares therein. ”

In accordance with this judgment two *experts* were named, viz: Simon Peters, architect and builder, and Henry J. Jamieson, brewer, and these two *experts*, having visited the property together, and not being able to agree in opinion as to its divisibility, or otherwise, produced and filed their separate reports ; Peters reporting that the property in question was indivisible, and Jamieson reporting that it was divisible.

Upon the publication of these two reports, Boswell, one of the respondents, moved, that inasmuch as by the report of Simon Peters, in this cause filed, it appears that the property cannot be divided so as to give the parties in this cause their respective portions, the said report be confirmed and homologated, and inasmuch as the report of Henry J. Jamieson, does not show that the said property can be divided so as to give one half thereof to the plaintiff, one fourth to the defendant, McCallum, and the other fourth to the defendant, Boswell, that the said report be rejected ;

and on this motion the Court rendered the following judgment, (the judgment complained of) : " The Court having heard, &c. Considering that the premises to be licitated in this cause have been fitted up and used as a brewery, and that the same cannot be divided so as to leave each part a brewery, doth adopt the report of the *expert* Simon Peters, and reject the conclusions of that of the *expert* Henry J. Jamieson, and doth order that the parties proceed in the cause accordingly. "

LLOYD, JAS C., for appellant : It is respectfully submitted that the above judgment is incorrect, both in point of law and in point of fact, and first, in point of law : Because when two *experts* disagree in a case, and lay two separate and different reports before the Court, one of these cannot be homologated and the other rejected without some proof of their correctness or incorrectness. What proof does the law require ? The law requires the report of a third *expert*, the manner of whose appointment is distinctly pointed out. The authorities on this point are convincing and decisive. (1)

In the Ordinance of 1667, Titre 21, Art. 12, it is said : " Siles experts sont contraires en leur rapport le juge nommera d'office un tiers qui sera assisté des autres en la visite, " etc.

Jousse says, that even when two *experts* agree in their reports, but the judge has some doubt, he may order a second visit accompanied by a third *expert* : Bornier says, the third *expert* should be named by the Court, so that he may be the more disinterested. The modern law of France, foreseeing the difficulties that would arise from the appointment of an even number of *experts*, provides that all *expertises* should be made by one or three *experts*.

(1) Ord. 1667, Tit. 21, Art. 13 :—Denisart, Vol. 2, p. 380, vbo. Experts, sec. 12 :—Jousse, Com. sur l'Ord. 1667, Tit. 21, Art. 13, en note, Vol. 2, p. 55 :—Bornier, Conf. des Ord., Vol. 1, p. 175, en note, Titre 21, Art. 13 :—Montgalvy, Traité des Arbitrages, Vol. 2, Art. 402, p. 88 :—Pothier, Proc. Civ., partie 1, Cap. 3, Art. 3 :—Guyot, Rep. de Jur., vbo. Expert :—Serpillon, Com. sur l'Ord. de 1667, titre 21, Art. 13, en note :—Dallos, Jurisp. Generale, 1845, vbo. Experts :—Vasserot, Manuel des Experts, p. 26 :—Montgalvy, Vol. 1, p. 91.

Montgalvy says that the Code Civ. is a great improvement on the old French law, inasmuch as it provides that an *expertise* must be made by one or three *experts*, and that under the old French law, when two *experts* disagreed it was necessary to appoint a third, all these different authors seem to have had but one opinion as to the necessity for the appointment of a third *expert*.

It has been said that the judge is not bound by the reports of the *experts*, and that he can homologate or reject one or all of them as he thinks proper, admitting this to be correct to a certain extent, it does not hold good in all cases ; granting for the sake of argument that the judge is not bound in all cases by the reports of the *experts*, there are still exceptional cases in which he must decide according to the reports, for instance when the judgment is directly based upon the report of *experts*. Vasserot, Manuel des *Experts*, says the report of the *experts* does not bind the judge except in certain cases where the law imposes on him the adoption of the reports.

Montgalvy, Arbitrage, says the Judge is not bound to follow the advice of *experts* where his conviction is opposed to it, but he says there are exceptions to this rule ; thus when the *expertise* is the special manner of determining a question. It will not be denied that an *expertise* was in this case the *moyen spécial indiqué*, for it is the manner pointed out by law for deciding on the divisibility, or otherwise, of the property, and in the present case it is the manner pointed out by the wish of all the parties in the cause, the plaintiff having asked for it in his declaration, and the defendants having both consented to the *expertise* taking place. The *expertise* was then the only evidence before the Court on which to found its judgment. The *experts* reported differently, and the only course left open to the Court was the appointment of a third *expert*.

But supposing this judgment to be correct in point of law, and that the Judge has the power to homologate or

reject either or both of the reports if he think proper, this power is not absolute, there must be reasons assigned as in the case of a judge considering a question where the evidence is contradictory, he will either ask for further evidence, or, where that cannot be obtained, he will carefully examine the evidence adduced and consider the respective positions of the witnesses, and their probable knowledge of the subject on which they testify. In this case further evidence might have been procured, a third *expert* might have been appointed. The Court refused to appoint a third *expert* and it is assumed it had that right. The Court received the reports and homologated the one which it considered correct. I submit that this decision of the Court was wrong in point of fact. An examination of the judgment under which the *experts* were appointed, and a comparison of this judgment and of the duties therein pointed out to the *experts*, with the reports themselves, will, I think, establish clearly which of them performed his duty, and which exceeded his powers ; by that judgment the Court declared that it considered the plaintiff the proprietor *par indivis* of one half, and the defendants the proprietor of the other half of the property, (be it observed not each defendant the proprietors of one fourth, but the defendants jointly the proprietor of one half) and in consideration of this fact ordered the appointment of *experts* who should report whether the property could be divided into portions corresponding to the rights of the parties, one of the *experts* reported on this judgment that the property was indivisible because it could not be divided into three portions, and this report was homologated ; the other, a brewer by occupation for a great number of years, and intimately acquainted with the working of breweries, declares the property can be divided so as to give one half to the party plaintiff, and one half to the party defendant, as the judgment ordered him to do, and if the Court, as is pretended by the respondents, had the power to homologate either of these contradictory reports, it appears to me that the latter having been made in accordance with

the judgment was the one which should have been taken by the Court as the basis on which to found its judgment.

CAMPBELL, for the respondent, Boswell, maintained the correctness of the judgment appealed from, both in point of law and in point of fact :—

Our law is clear upon the point that the Courts are not bound to adopt the reports of the *experts*. Guyot, vbo. *Expert*, page 224, paragraph 4, says :—“ Les experts ne sont point juges ; leur rapport n'est jamais considéré que comme un avis, donné pour instruire la religion du juge, et celui-ci n'est point astreint à suivre l'avis des experts. ” The modern law of France is to the same effect. “ L'expertise diffère de l'arbitrage, en ce que les experts ne font que rendre compte de leur mission et présenter leur avis, *sans que les juges soient astreints à suivre cet avis.* ” (1)

Denisart in his *Collection de Jurisprudence*, vbo. *Expert*, par. 20, says :—“ Le rapport des experts n'est fait que pour éclairer la religion du juge, et non pour gêner sa décision ; c'est au juge à examiner le mérite du rapport, dont il peut s'écarter, quand il croit le devoir faire, (à moins que le fait dont il s'agit ne soit absolument étranger à ses lumières) parce que l'avis des experts n'est pas considéré comme autorité, mais comme avis et mémoire sujets à examen. ”

Lepage, in his *Lois des Bâtiments*, vol. 2, page 311, expresses the same opinion, in the following terms :—“ Il est de principe qu'un rapport d'experts n'est qu'une lumière requise par le tribunal, et non pas une règle à laquelle les juges soient obligés de conformer leur décision. Les juges ne sont pas astreints à suivre l'avis des experts, si leur conviction s'y oppose. ”

Guyot, vbo. *Expert*, p. 224, in the 4th paragraph of the 2nd column, puts the following question :—“ Mais le juge doit-il ordonner un nouveau rapport, toutes les fois qu'une des

(1) *Dict. du Notariat*, vbo. *Expert*, vol. 4, page 335, part 2.

parties le demande et offre d'en avancer les frais ?" and answers thereto " Non ! " But even had the answer thereto been in the affirmative, it would have been of no avail to the appellant in the present cause, as he made no application to have another report made by his *expert*, nor that another *expert* should be named.

Dutruc, an author who writes under the modern French law in his " Traité du partage de succession ; deuxième partie, Ch. 3, Nos. 368, 372 et 373, is very explicit on this subject. " On sait que le tribunal doit ordonner la vente " par licitation des immeubles lorsqu'ils ne peuvent être " partagés commodément : mais il est difficile de préciser " bien exactement une limite à cet égard, cependant on " peut établir quelques règles propres à trancher le doute " dans les cas principaux. "

He lays down as fixed principles or rules that, " l'égalité doit régner dans tout partage, " and one of the coproprietors cannot be forced to take a sum of money or other equivalent for his share of the property, while his coproprietor takes the property itself. Another rule laid down by him, is : " l'on doit procéder à la composition d'autant de " lots qu'il y a de copartageants : — Que l'on suppose " que les immeubles d'une succession, échue par exemple " à trois héritiers, dont l'un doit en prendre la moitié pour " sa part, et chacun des deux autres un quart pour sa portion, ne puissent être commodément divisés qu'en deux " lots, il n'est pas douteux que la licitation devra être ordonnée, et que les tribunaux ne pourront prescrire un partage. "

Here then is an authority exactly parallel with the case before us. In the authority just cited there are three heirs, in the present case there are three coproprietors. It is clear from the reports of both the *experts* filed in this cause that the property in question cannot be *commodément* divided into three parts. Peters says so directly, and Jamieson the other *expert* implies it by reporting that it can

be divided into two. The proof before the Court goes then to establish the fact that this property is indivisible, or, at any rate, cannot be conveniently divided between the parties, and the Court has rendered the only judgment it could render in conformity with the law, and has ordered the sale by licitation of the whole property.

MEREDITH, Justice.—It appears, as well according to the report of Mr. Peters, as according to that of Mr. Jamieson, as I read it, that the property in question cannot be divided without destroying its distinctive character, *as a Brewery*, and thereby—it appears to me, materially diminishing the value of the whole of it. I would therefore be disposed to confirm the judgment of the Superior Court. (1) At the same time, if the learned Judge who adjudicated upon this case had thought fit to name a third *expert*, as I believe is about to be done by a majority of the Judges of this Court, I would not have deemed such a proceeding objectionable.

Even according to those who think the property in question is not divisible, the case cannot be considered as free from doubt; and before ordering the licitation of so valuable a property, it might perhaps have been desirable to obtain further information. But, neither of the parties moved for the nomination of a third *expert*; and therefore, I think that the Court below was justified in disposing of the case upon the record as submitted.

Taking this view of the case, I find that Mr. Jameison, proposes that the property should be divided so that one part of it may, hereafter, be used as a brewery, and the remainder of it, as a malting establishment.

He says that throughout Great Britain and Ireland, with few exceptions, in all large concerns, the brewing and malting are carried on separately, and that malt is bought and sold on change according to sample.

(1) Troplong, Vente, No. 863 :—Chabot de l'Allier, vol. 3, p. 121, sur l'Art. 827, Code Civ. :—Bourjon, vol. 2, p. 524, No. 7 :—Dutruc, Partage et Suc., p. 372, No. 376.

No instance, however, is given of any person in Lower Canada carrying on the business of brewing without, at the same time, carrying on the business of malting; nor of any one carrying on the business of malting, without at the same time carrying on the business of brewing; and although it is said, and I have no doubt with truth, that in Great Britain and Ireland, malt is bought and sold *on change* according to *sample*, it is not contended that any such custom exists at Quebec.

The property in question appears to have been originally established as a brewery, with a malting establishment attached to it.

It was as an establishment of that kind that the parties now before the Court became interested in it; and it appears to me that neither of them has a right, without the consent of the other, to insist upon a division which would render it necessary for them *both* to carry on business in a manner unusual in this country, and which would appear to be contrary to their own views when they acquired the property, and also contrary to the views and intentions of the parties by whom the brewery in question was established.

I may add, that it has not even been contended that the property could be used for any other purpose than a brewery without greatly decreasing the value of the whole of it.

BERTHELOT, Juge.—Le 3 janvier, 1842, l'appelant, Thomas Lloyd, et Paul Lepper, devinrent adjudicataires à la vente qui en fut ce jour là faite par la shérif de Québec, d'un immeuble désigné comme suit: "All that lot of ground
"situate and being immediatly in front of the lot of ground
"last above described (in the sheriff's title) consisting of
"180 feet, or thereabouts, in front, bounded in front by St.
"Charles Street, in the rear by St. Paul Street, on one side
"towards the west by John Bell, representing Joseph Noël,
"and on the other side towards the east by a street, leading
"from St. Charles Street, to St. Paul Street, together with

"the several houses, stores and other buildings thereon erected and built, and thereunto belonging, including the fixtures and machinery; the said lots of ground and premises situate and lying in the Lower Town of the City of Quebec.

Le 3 décembre, 1861, les intimés devinrent adjudicataires à la vente qui en fut faite par le shérif de Québec, de la moitié indivise de l'immeuble ci-dessus désigné, laquelle avait appartenu jusqu'alors au dit Paul Lepper, et continuèrent d'en être co-propriétaires, conjointement et par indivis, jusqu'au jour de l'introduction de la présente demande en partage et licitation, faite le 11 décembre, 1861.

Par les conclusions de son action, l'appelant demande à être déclaré propriétaire par indivis d'une moitié de l'immeuble ci-dessus désigné, à d'en jouir par divis, et que la division et licitation en ait lieu à l'amiable, sinon suivant le cours ordinaire de la loi, et qu'à cette fin il soit procédé à la visite des lieux par experts, pour déterminer si l'immeuble peut se partager commodément, sinon, à ce qu'il soit vendu au plus haut et dernier enchérisseur; pour le prix en être également divisé entre les parties suivant leurs parts, et que vu le refus des défendeurs, de consentir à la division et licitation ils soient condamnés aux dépens.

Le 5 mars, 1862, le défendeur Boswell, a déclaré par son avocat, qu'il acquiescait aux conclusions de la déclaration, excepté quant aux frais.

Le même jour le défendeur McCallum, a aussi fait une déclaration au même effet, consentant au partage, *s'il était possible*, et à la licitation de l'immeuble si cela devenait nécessaire. Cela indique bien que ce défendeur ne reponssait pas absolument l'idée de la possibilité d'un partage.

Le même jour fut rendu le jugement déclarant le demandeur et les défendeurs, co-propriétaires *par indivis*, savoir, le demandeur pour une moitié, et les défendeurs pour l'autre

moitié, ordonnant une expertise pour déterminer : 1o. si l'immeuble pouvait être partagé en parties correspondantes aux droits des parties : 2o. *ou s'il pouvait être partagé avec soulte* : 3o. enfin ordonnant que s'il était rapporté qu'il ne pût être partagé avantageusement, il fut procédé à la vente par licitation, pour le prix en être distribué aux parties selon leurs droits.

Pour mettre ce jugement à exécution, Mr. H. J. Jameison, fut nommé expert de la part du demandeur, et Mr. Simon Peters, de la part des défendeurs. Ces deux experts n'ayant pu s'entendre pour faire un rapport conjointement, en ont fait chacun un à leur point de vue particulier.

Mr. Peters a rapporté que l'immeuble et les bâties dessus construites ne pouvaient pas être divisées commodément ; de manière à donner une moitié au demandeur, et un quart à chacun des dits défendeurs, attendu qu'il n'était pas possible de faire de partage, sans ruiner entièrement l'établissement connu comme brasserie.

Voici ses propres expressions :

“ That the said lot of ground, buildings and premises
 “ are indivisible and cannot be conveniently divided, so as
 “ to give one half to the said plaintiff, a quarter thereof to
 “ the said D. McCallum, and the other quarter to the said
 “ J. K. Boswell.”

Je dois de suite remarquer que ce rapport n'est pas tout à fait conforme à ce que l'on devait attendre, puisque cet expert a pré-supposé qu'il pouvait s'agir d'un partage entre les deux défendeurs, tandis qu'il ne peut nullement en être question. Dans la présente cause, il ne s'agit seulement que de la possibilité de faire un partage en deux parts, dont une pour le demandeur, et l'autre pour les défendeurs, et en second lieu de voir si, ne pouvant pas faire deux parts égales, il y aurait un moyen de faire un partage avec soulte, ce surquoi l'expert Peters n'a point fait de rapport, en sorte que cette partie du jugement n'est pas satisfaite et répondue.

M. Jamieson, par son rapport, a émis l'opinion qu'il y avait moyen de partager l'immeuble et ses dépendances en deux parties ou portions, dont une pour le demandeur, et une autre pour les défendeurs, et ce sans retour, ou soulte, attendu que bien que la moitié, ou partie *ouest*, était plus grande en superficie, la partie *est* avait de meilleures bâtisses. C'était assez bien rencontrer l'exigence du jugement interlocutoire quant aux deux premiers points.

Si l'expert Peters avait concouru dans ce rapport, il aurait bien fallu y donner suite et faire procéder au partage, mais il a contredit là-dessus l'expert Jamieson, et c'est là la difficulté.

La Cour de première instance par son jugement du 4 juin, 1842, sur motion à cet effet de la part du défendeur Boswell, a rejeté le rapport de l'expert Jamieson, et a homologué celui de l'expert Peters, pour les motifs suivants : "Considering that the premises to be licitated in this cause have been fitted up and used as a brewery, and that the same cannot be divided, so as to leave each part a brewery; doth adopt the report of the *expert* Simon Peters, and reject the conclusions of that of the *expert* Henry J. Jamieson, and doth order that the parties proceed in the cause accordingly."

L'appelant se plaint de ce jugement en citant l'article 13 du titre 21 de l'ordonnance de 1667. "Si les experts sont contraires en leur rapport, le Juge nommera d'office un tiers qui sera assisté des autres en la visite, &c., &c.;" et maintient que ce qui est exigé par la loi à cet égard n'a pas été observé, et qu'il aurait fallu procéder à la nomination d'un tiers expert. Sans entrer dans la discussion de cette question, il suffit pour les fins de cet appel, de s'enquérir si par l'un ou l'autre de ces rapports, il a été satisfait et répondu à ce qui était exigé et demandé par le jugement du 5 mars, 1862.

Je crois qu'il est impossible de nier que le rapport de Mr. Peters a entièrement failli d'y satisfaire, et que cet expert est tombé dans une erreur complète en s'enquérant

de la possibilité de faire un partage par moitié et par quart ; ce n'était pas cela dont il s'agissait, et son rapport aurait dû être renvoyé, au lieu d'être homologué.

Si un des deux rapports pouvait et devait être homologué l'un plus que l'autre, c'était assurément celui de Jamieson, puisqu'il paraît avoir répondu à tout ce qui lui était demandé, mais ce n'est pas encore cependant ce qui pouvait ou devait être fait, attendu le rapport de Peters, qui différait de celui de Jamieson, et c'était le cas pour la Cour d'ordonner, vu la différence d'opinion des experts, et l'insuffisance du rapport de l'expert Peters, qu'il fût procédé à la nomination d'un tiers expert pour les départager, (ou à en nommer d'autres) *aux fins d'exécuter à la lettre le jugement interlocutoire du 5 mars, 1862.*

D'après la description des lieux, le rapport de Jamieson, et le plan y annexé, il ne paraît pas qu'il y ait impossibilité réelle d'en venir à un partage. Je crois même qu'il peut y en avoir un, sinon sans soulte, du moins bien certainement avec un retour, ce qui peut se faire et doit se faire, s'il est aucunement possible de laisser à chacun une moitié ou une partie de la propriété commune à tous deux.

Si personne n'est tenu à demeurer dans l'indivis, l'on ne doit pas non plus ordonner la vente par licitation à moins qu'il n'y ait impossibilité de faire un partage, si l'un des co-propriétaires réclame, et s'oppose à la vente par licitation.

Ce n'est que dans le cas où le partage aurait l'effet de déprécier l'héritage qu'il faut avoir recours à la licitation, la propriété est une chose si désirable et si précieuse, qu'il faut, en pareil cas, en laisser à chaque propriétaire indivis une part, s'il est aucunement possible de le faire, sans faire subir une perte ou un dommage à l'autre co-propriétaire.

Je suis donc d'avis que le jugement du 4 juin, 1862, doit être infirmé, et qu'il soit ordonné qu'il soit procédé devant la Cour Supérieure, par les mêmes experts assistés d'un tiers, ou par d'autres experts, s'il devient nécessaire, à exécuter le jugement du 5 mars, 1862.

Judgment : The Court, &c.—Seeing that Jamieson and Peters, the *experts* appointed in the cause have disagreed, and have made two separate and different reports before the Court below, to wit : the said Jamieson reporting that the immoveable property belonging to the parties can be divided into two portions corresponding to the rights of the same, and the said Peters being of opinion that it would be impossible to divide the said property, lot of ground, &c. ; seeing therefore that a *tiers-expert* is necessary to decide the controversy, and that in the judgment of the Court below by which the Court hath adopted the report of one of the *experts*, and hath rejected the conclusions of the other without taking the advice and opinion of such *tiers-expert*, there is error ; It is considered and adjudged that the said judgment be and the same is hereby reversed.

And proceeding to render the judgment which the Court below ought to have rendered : It is considered and adjudged that the record be remitted to the Court below, to the intent that in the said Court it be proceeded in due course to name a *tiers-expert d'office*, who shall, with the *experts* already named and appointed, attend and meet the said Jamieson and Peters, to view and examine the immoveable property in contestation between the parties, to wit : “ All that lot of ground &c. ” And that the said *experts* and *tiers-expert* do report whether the said immoveable property can or cannot be divided into two portions corresponding to the rights of the parties, or in what manner partition can be made, and if so, with *soulte* or without, and that a *plan figuratif* be filed under the direction of the said *experts*, to the intent that upon the report of the *experts* and *tiers-experts* such proceedings may be had as to law and justice may appertain in the premises.

Dissentientibus, DUVAL and MEREDITH.

LLOYD, JAMES C., for appellant.

CAMPBELL and GIBSON, for respondent Boswell.

HOLT and IRVINE, for respondent McCallum.

QUEEN'S BENCH, } DISTRICT OF MONTREAL
 APPEAL SIDE. }

Before :—DUVAL, Chief-Justice, MEREDITH, MONDELET,
 and BADGLEY, Justices.

DAVIES, *Appellant.*

and

CUSHING, *Respondent.*

Held :—10. That where in a deed of sale of certain lots of land in consideration of a certain sum paid down, and "of the further payment to be made forever thereafter, to the vendor, of the one tenth part of all net profits to result after deduction of losses and charges of all minning operations, as the purchaser shall carry on in and upon the said lots, the same to be ascertained to the 31st day of December, yearly; and to be duly accounted for and paid over within the six months next following;" such percentage is payable, not only on mining operations by the purchaser individually, and alone, but also on all mining operations carried on by him in conjunction with others, or in which he was, or was to be, interested.

20. That an account rendered allowing only to the plaintiff, as representing the vendor, one tenth of the profits realized by the defendant personally from the mines, without regard to the amount realized or retained by a lessee or person actually working or carrying on the mines, is contrary to the meaning of the clause referred to, and that a new account will be ordered.

Jugé :—10. Que lorsque dans un contrat de vente de certains lots de terres en considération d'une certaine somme payée, et "en outre du paiement ci-après et à toujours, au vendeur, de la dixième partie des profits nets après déduction des pertes et charges résultant de tous travaux de mines, que l'acquéreur fera sur tous les dits lots, lesquels profits seront constatés le 31 décembre de chaque année, et desquels il sera rendu compte et iceux payés dans les six mois ensuivants : "tels profits sont payables, non seulement sur les travaux de mines faits par l'acquéreur individuellement, mais encore sur tous travaux de mines faits par lui conjointement avec d'autres, et dans lesquels il devait être, ou était, intéressé.

20. Qu'un compte rendu allouant seulement au demandeur, comme représentant le vendeur, un dixième des profits réalisés sur les mines par le défendeur individuellement, sans égard au montant réalisé ou retenu par un locataire ou une personne faisant les travaux des mines, est contraire au sens de la clause ci-dessus citée, et il sera ordonné une nouvelle reddition de compte.

Judgment rendered the 9th March, 1864.

The facts of this case and the judgment rendered in the Court below, will be found in the 13 L. C. R. p. 217.

BADGLEY, Justice.—By deed of sale of 21st July, 1859, Mrs. Cushing, the vendor, states herself to be the owner of two lots of land in Acton, "in and upon which there are understood to exist valuable copper and other minerals, ores; the situation, extent and value whereof are not sufficiently known," and the defendant, the purchaser states "he proposes to make further explorations for the

"said ores, and if they shall be found valuable enough, that he will then carry on extensive mining operations in and upon the said lots." The nature of the transaction is thus exhibited, Mrs. Cushing had the land with possible metalliferous deposits, which she did not work herself, and was unwilling to expend money in exploring; and Mr. Davies, having the capital, was willing to prospect, and explore the lots, for the purpose of ascertaining the situation, extent and value of these deposits: She therefore sells to him the two lots for \$1400 in cash, and with "the condition of the further payment forever thereafter to be made to her of one tenth part of all net profits to result after deduction of losses and expenses from all such mining operations as the purchaser should carry on in and upon the said lots of land, to be ascertained to the 31st of December, yearly, and to be duly accounted for and paid over within six months next following."

Independently of the sale itself of the lots of land there are manifestly two objects contemplated by the deed, firstly, the continued further explorations upon the lots for the discovery of the sufficient extent and value of the deposits, with the view to ascertain its workable quality as a commercial speculation, and, secondly, the consideration reserved by Mrs. Cushing of the one tenth part of the net profits of the mining operations themselves, if by the effect of the explorations the sufficiency of the extent and value of the deposits should be established to justify mining operations as a commercial operation.

The two objects, namely, the explorations and the mining operations are therefore *in se* manifestly different, the consideration of the former was finally settled and concluded at once, *une fois payé* by the \$1400, that of the other was prospective, only to commence if mining operations were carried on, that is as stated in the deed, *bona fide* carried on. Under the former, the defendant explored for mines as an adventurer, at his own risk, under the latter, he carried

on mining operations as a mine proprietor and worker, with positive rights and substantial interest in himself, but whereof a portion was reserved for Mrs. Cushing.

It is not necessary in this connection to consider the legal nature and character of this reservation of the one tenth part of the net profits of the mining operations, as the constituent of a partnership between the defendant and Mrs. Cushing, because the contention does not arise between them upon that point, but if it were indeed a partnership, it is clear that the defendant could not by his own act, or by his introduction of new partners, diminish or prejudice her original share, and the portion reserved by her out of the net profits of the operations, and therefore any such arrangement or act by the defendant, could only attach upon his own share.

On the 2nd of September, 1859, the defendant and one Sleeper contracted together as follows; Sleeper undertook at his own cost and expense to commence forthwith mining operations upon the said lots of land, and to carry them on for three years, from the said date; all the ore to result therefrom to be divided between them at the mine, to wit, "one half to each, until the half should amount to \$1400 in value, and afterwards two thirds to Sleeper, and one third to the defendant, to wit, of the ore at the mine;" but Sleeper might terminate the agreement sooner upon giving to the defendant six months notice. At the close of the agreement, all the plant on the ground, &c., should remain to the defendant, but Sleeper was to dress on the ground all the ore that remained: The one third share appropriated to the defendant was to be free and clear of cost and expense, the whole of which was assumed by Sleeper, in consideration of and to be borne by him out of his two thirds share. Finally, that such percentage "of profit as might accrue to Mrs. Cushing under the said deed of 21st July, 1859, should be borne by the defendant, and Sleeper, according to their shares of the ores."

This agreement has reference to mining operations *per se*, the proper working of the mine, and not to explorations, and it may be assumed, therefore, that the preliminary explorations of the defendant had been satisfactory, and that the extensive operations contemplated by the deed, were to be actually commenced. It should be mentioned that at a short time subsequent to the date of this agreement, between the defendant and Sleeper, it was modified to the extent that the ore extracted was to be rendered fit for market, and to be there realized by Sleeper.

Now taking the case of the defendant as the sole worker of the mine, in so far as Mrs. Cushing is concerned, her right to her one tenth share of the net profits began to take effect, under the terms of her deed, from the commencement of his mining operations, and his extraction of the metalliferous deposits; she knew no other contractor with herself but him, nor of any other produce from which her share of profits was to be divided, than the gross proceeds of the ores extracted from the lots sold by her; less the costs and expenses required for extracting the ores, preparing them for market, and realizing them there when so prepared. Her right was a material right influenced by and subjected to the yield of the ores. It is notorious that mines of this description require an adequate system of expenditure, and hence in the agreement contained in the deed between Mrs. Cushing and the defendant, as he was to incur that expenditure, the division of net profits, after losses and expenditure, was equitably adopted by them, instead of the gross extracted ore. In metalliferous mines in England, the rents or reservations are almost invariably proportioned to the quantity of ores actually raised, and without a stipulated certain rent in money. This is called the *duty ore*, or the *lot ore* or the *lord's dues*. In the case of Mrs. Cushing, the reserve stipulation took the shape of a portion of the realized net profits, that is the amount of the gross sales, less the expenses and losses incurred in the extraction and sale, and this was all to which she was entitled; she had

no other right or control in the matter. As before explained, this was the defendant's contract with her. Did he or could he change it, by his agreement with Sleeper, without her assent? Certainly not, and it has been shewn that neither she nor her assignee ever recognized or became a party to the agreement between the defendant and Sleeper.

Now the nature of the agreement with Sleeper shews that it did not, in any way, interfere with Mrs. Cushing's tenth of the said net profits. But was that agreement a charge or loss, such as was contemplated by the deed? The agreement is that Sleeper should work the mine at his own cost for the profit of the defendant and himself, and should make a division between them of the amount realized in the manner and according to the proportions specified; plainly an agreement to carry on the extensive mining operations contemplated by the deed, on joint account, for the time limited by the agreement.

It was this mining operation, and the net profits resulting from the realization of the ore raised, upon which the one tenth of net profits was reserved, and that it was so, and was so understood by both Sleeper and the defendant, is made quite clear from the special stipulations in their agreement respecting that reservation, namely, that "such percentage of profit, that may accrue to Mrs. Cushing under her deed, shall be borne by the parties, the defendant and Sleeper, rateably according to their shares of such ores," or as afterwards agreed between them "according to their shares of the net amount realized from them." By the agreement the one third share of the defendant of the prepared ore was to be his without cost, expense or deduction, whilst the two thirds share of Sleeper was to bear all the cost and expenses of extraction, preparation and sale, in which addition was to be charged the two thirds of Mrs. Cushing's percentage, whilst the defendant was chargeable with the remaining one third upon his clear third part or share. Hence the covenant in the deed of sale

from Mrs. Cushing to the defendant, reserving to her the one tenth of the net profits, aforesaid, has been substantially recognized by both the defendant and Sleeper in the terms of their agreement. The plain and simple deduction from all this is, that her assignee, the respondent, plaintiff in the Court below, has a right to demand and have a just and true account made up of the net profits realized from all the ores extracted and raised from the mines in question. The account should exhibit this gross extract as well as the losses and charges, in other words the expenses of working the mines and realizing the proceeds. From this the net profits will be exhibited and Mrs. Cushing's one tenth established: "le produit net sera établi d'après les livres "ou comptes d'exploitation, constatant les produits extraits, "défalcation faite de tous les frais d'extraction et de réa-
"lization des dits produits." In the case before us, the defendant in answer to the demand for a just and true account of the net profits from the working of the mines, has produced an account which has been *débattu* by the defendant, as being only a partial account. Upon the merits submitted, that account is limited to the defendant's third share under his agreement with Sleeper, and does not shew the gross produce of the mine nor the amount of the net profits of that produce. The account produced is not sufficient therefore, and the judgment of the Superior Court, is therefore quite correct in requiring the defendant to produce the proper account required under the terms of the deed of sale between Mrs. Cushing and himself, for the net profits of the gross produce of the ores extracted, instead of the partial account that has been submitted by him.

MONDELET, Justice.—I consider the judgment of the Court below, condemning the appellant to render an account, and affirming the rights of the plaintiff to $\frac{1}{4}$ of the net proceeds of the mine to be correct. It matters very little whether the mine was worked by Davies or by Sleeper. Davies agreed to explore the mine, and $\frac{1}{4}$ part of the net proceeds belongs to the plaintiff. It follows that the account

rendered by Davies, is predicated upon a false assumption. It is consequently right that he should render a new account.

I am therefore of opinion that the judgment of the Court below should be confirmed.

Judgment confirmed.

STUART, H. for appellant.

ROBERTSON, A. and W. for respondent.

CIRCUIT COURT.—BEDFORD.

Before :—McCord, Justice.

No. 868. { DARAH, Plaintiff.
 vs.
 { CHURCH, Defendant.

Held :—That the five years prescription of a Promissory Note, under 12 Vict., chap. 22, sect. 31, is not interrupted by the defendant's absence of seven or eight years from Canada.

Jugé :—Que la prescription de cinq ans contre un billet promissaire, en vertu de la 12 Vict., cap. 22, sec. 31, n'est pas interrompue par l'absence du défendeur du Canada pendant sept ou huit ans.

Judgment rendered the 11th February, 1861.

This was an action upon two promissory notes, the first bearing date on the 10th January, 1851, for \$31, payable one day from date, with interest, and the second on the 22nd April, 1852, for \$34, payable six months after date, with interest.

The action was instituted on the 26th of April, 1860.

The defendant pleaded the five years prescription under the statute.

In his special answer the plaintiff alleged in effect that in April, 1852, the defendant left this Province, and was absent from Lower Canada up to about a year before the institution of the action, and that prescription was thereby interrupted.

The defendant gave admission of the fact that he had been an absentee from this Province from 1852 to 1859.

It was held that the defendant's absence did not interrupt the prescription, and that the statute afforded a remedy to the plaintiff against the defendant, had he chosen to avail himself of it, during the defendant's absence, by calling him in by advertisement.

Action dismissed with costs.

FOSTER, for plaintiff.

RACICOT, for defendant.

QUEEN'S BENCH, }
APPEAL SIDE.

DISTRICT OF QUEBEC.

Before:—Sir L. H. LaFontaine, Bart., Chief-Justice,
MEREDITH, MONDELET and BADGLEY, Justices.

DINNING..... *Appellant.*

and

OLIVER..... *Respondent.*

In this case the sheriff, in his return to a writ of *saisie-arrest* issued in the year 1857, certified, "that he had attached in the hands of Edward Oliver, the defendant, a certain ship or vessel called the *Melbourne*," as mentioned in the *procès verbal* of seizure annexed to his return, and by the *procès verbal* it appeared that François Langlois and Jean Lachance, were the guardians.

Afterwards, in return to a writ of *venditioni exponas*, issued in the year 1860, in the same cause, the sheriff certified that the respondent had been appointed guardian, under the said writ of *saisie-arrest* so issued in 1857, but did not return the *procès verbal* establishing the appointment of the respondent as guardian.

Held, in the Superior Court:—That the sheriff after his return of a writ of *saisie-arrest simple*, is *functus officio*, and can thereafter exercise no authority over the seizure made by him, not even to the appointing of a *gardien volontaire* in the stead of a *gardien à gages*.

In the Court of appeals:—1o. That it is no part of the official duty of a bailiff employed by the sheriff to return to the Court his doings under a warrant from the sheriff, and such return, if made to the Court, will be regarded as an unofficial act, and therefore not authentic.

2o. That the statement so made by the sheriff in his return to the writ of *venditioni exponas*, in the year 1860, was not legal evidence of the appointment of the respondent, as guardian under the writ of *saisie-arrest*.

Dans cette cause le shérif, par son retour à un writ de *saisie-arrest* émané en 1857, certifie, "qu'il avait saisi entre les mains d'Edward Oliver, le défendeur, un certain vaisseau appelé le *Melbourne*," tel que mentionné dans le *procès verbal* de saisie annexé à son rapport, et par le *procès verbal* il apparaissait que François Langlois et Jean Lachance, étaient les gardiens.

Subséquentement, sur rapport du *venditioni exponas*, émané en 1860, dans la même cause, le shérif certifie que l'intimé avait été nommé gardien, sous le dit writ de *saisie-arrest* ainsi émané en 1857, mais il ne fit pas rapport du *procès verbal* constatant la nomination de l'intimé comme gardien.

Jugé, dans la Cour Supérieure:—Que le shérif après son rapport d'un writ de *saisie-arrest simple*, est *functus officio*, et ne peut par après exercer aucune autorité sur la saisie pratiquée par lui, pas même quant à la nomination d'un gardien volontaire au lieu d'un gardien à gages.

Dans la Cour d'Appel:—1o. Qu'il n'appartient pas et qu'il n'est pas du devoir d'un huissier employé par le shérif de faire rapport à la Cour de ses procédés en vertu du warrant du shérif, et que si tel rapport est fait à la Cour, celui sera considéré comme non officiel, et partant comme non authentique.

2o. Que l'énoncé ainsi fait par le shérif dans son rapport au writ de *venditioni exponas*, en 1860, ne constatait pas d'une manière légale la nomination de l'intimé, comme gardien en vertu du writ de *saisie-arrest*.

Judgment rendered the 22 June, 1862.

The appellant having brought suit against one Oliver, and sued out a writ of *arrest-simple* before judgment, he caused a certain vessel of the defendant, called the

Melbourne, to be attached under this writ ; upon this attachment being made two guardians were appointed, namely, François Langlois and Jean Lachance, it appeared that subsequently the respondent was appointed as voluntary guardian in the cause.

The plaintiff having obtained judgment against the defendant for a sum of £704.9.7, and the attachment having been declared good and valid, he sued out a writ of *venditioni exponas* ; upon this writ the sheriff subsequently made his return, to the effect that the guardian, the respondent, had neglected and refused to deliver the vessel seized.

Upon this the plaintiff then moved the Court below for a *contrainte* in the following terms :

" That inasmuch as (as appears by the return to the writ of *venditioni exponas* in this cause issued) Thomas Hamilton Oliver, of Quebec, Esquire, merchant, the *gardien* of the ship or vessel called the *Melbourne*, seized under the writ of *arrêt-simple* in this cause issued, hath neglected and refused to deliver over to the said sheriff the said ship *Melbourne*, and has thereby prevented the said sheriff from effecting a sale of the said ship, as the said sheriff was commanded to do by the said writ of *venditioni exponas* ; and inasmuch as the said Thomas Hamilton Oliver, being *gardien* as aforesaid, sent, or permitted the said vessel to be sent out of the Province of Canada, and to parts beyond the seas, and beyond the jurisdiction of this Court, and which said vessel is of the value of two thousand pounds currency, and upwards, a *contrainte par corps* do issue against the said Thomas Hamilton Oliver, and that he be imprisoned in the common Goal of this district, and there detained, until he shall have produced and delivered to the said sheriff the said ship or vessel called the *Melbourne*, and paid the costs hereupon incurred ; and that in the event of the said Thomas Hamilton Oliver showing that he cannot produce the said vessel, that he be detained in the common Goal of this district until he shall have paid to the

plaintiff the sum of seven hundred and four pounds, nine shillings and seven pence, currency, with interest on the said sum from the twenty-ninth day of October, eighteen hundred and fifty eight, and costs of suit, taxed at the sum of thirty pounds, nine shillings and five pence, with the sum of sixteen shillings and six pence, the sheriff's costs on the said writ of *venditioni exponas*, and the costs of the present motion, and of the said writ of *contrainte par corps*. ”

And a rule *nisi* having been granted, the respondent was served personally with the same, as well as with an affidavit shewing the value of the vessel in question, and that she was suffered by the respondent to leave the Province in the fall of 1857.

The rule having been duly returned the following order was made on the 3rd April, 1861 : “ The Court, &c., doth order, *avant faire droit*, that the plaintiff establish in evidence, *contradictoirement* with the said guardian, the value of the ship or vessel called the *Melbourne*, whereof the said Thomas Hamilton Oliver hath been appointed guardian, with costs of the said proceedings against the said guardian. ”

Subsequently, the appellant proceeded to establish by evidence the value of the *Melbourne*, and the parties having been heard, the following judgment was rendered.

“ The Court, &c. Considering that the sheriff by his “ return to the writ of *arrêt-simple* returns that he named “ two guardians, other than the said Thomas Hamilton “ Oliver, and that after the return of the said writ with his “ return thereto the sheriff was *functus officio* in relation “ thereto, and had no authority over the seizure already “ made by him :

“ Considering, moreover, that the certificate of the bailiff “ attached to the said writ and return, and dated after the “ return of the said writ into this Court cannot be looked “ to, and is without legal effect : considering that there is

“ no legal evidence of the said Thomas Hamilton Oliver
 “ having been named guardian in this cause by any person
 “ having a right to name him, doth dismiss the plaintiff’s
 “ motion for *contrainte par corps*, and the rule thereupon
 “ obtained, with costs against the said plaintiff in favor of
 “ the said Thomas Hamilton Oliver.”

It was from this judgment that an appeal was instituted.

HOLT, for appellant.—The judgment appealed from, it is respectfully urged by the appellant, is open to very grave objections and should be reversed.

It will not be denied that a defendant whose property is in the hands of a *gardien à gages* has the right of offering at any time a good and solvent *gardien volontaire*, and that the seizing officer is bound to accept of such substitute. Such right of the *saisi* is not limited, in its exercise, to the period antecedent to the return of the writ, and if the change be made subsequently to the return, it must necessarily appear otherwise than by the *procès-verbal* of seizure. The sheriff does not return to the Court, in any cause, that he has appointed any *gardien*, but being commanded by the writ “ safely to hold, keep and detain ” (the effects seized) “ in his charge and custody, until the attachment thereof shall be determined in due course of law,” he returns ; “ and the said ship so attached I now safely hold, keep and detain in my charge and custody. ” The sheriff “ holds and keeps ” through the *gardien*, whom the law compels him to take, but when by negligence, fraud or other misconduct on the part of the *gardien*, the property seized is made away with, or rendered useless to the creditor, the law looks to the wrong-doer, and not to the public officer who has been deceived. It is then, and then only, the appellant submits, that the law distinguishes between the sheriff and the *gardien*, and that it becomes necessary for the Court, whence the process has issued, to enquire:—Who was the person that assumed the actual and personal charge of the effects seized ?

The plaintiff in the Court below had nothing whatever to do either with the appointment of the original *gardien* (*à gages*) or with the substitution of the respondent as *gardien volontaire*, nor were the plaintiff, or his attorneys, in any manner parties to the presenting or filing of the document certifying the change of guardianship. The *procès-verbal* which mentions the appointment of the original *gardien*, is signed, not by the sheriff, but by the same two officers who have signed the certificate adverted to. The appointment and the substitution were equally the acts of the sheriff, for in his return (signed by himself) to the writ of *venditioni exponas*, he states that he had demanded possession of the ship "from the guardian, Thomas Hamilton "Oliver, Esquire, of Quebec, merchant, duly appointed by "me as such guardian, &c.

As the signature of the respondent is to be seen attached to the original *procès-verbal* of seizure, the presumption is that he accompanied the seizing bailiff to the office of the prothonotary of the Court below, and that the certificate of his substitution as *gardien* was filed in his presence.

But, be that as it may, upon what ground does the respondent expect to be listened to, urging the objection that he was not "duly" appointed? There are documents before the Court shewing that he assumed and took charge of the property seized. Whether the sheriff should, or should not, have asked leave of the Court to file the certificate objected to, was a matter which concerned the Court, or the defendant, but not him, the *gardien*. But, admitting some irregularity to have existed in the manner of certifying to the Court the change of *gardien*, it disappeared the moment the respondent appeared before the Court in the capacity of *gardien*, and all argument upon it is rendered idle by the proceedings taken on the part of the respondent in shewing cause against the rule, and the door was closed upon any objections of that kind by the interlocutory order of Mr. Justice Taschereau, above referred to.

ALLEYN, R. for respondent.—The return to a *procès verbal* may be looked upon as forming part of the return. The *procès verbal* in the present case does not establish that the respondent was constituted *gardien*; but on the contrary that two other persons therein named were appointed guardians. Unless the appellant can show that there is a return of the sheriff to the effect that he the sheriff appointed the respondent guardian, or that the Court appointed the respondent guardian, the appellant must fail in his proceedings against the respondent.

The appellant relies upon a paper attached to the writ of *saisie-arrest* as establishing a substitution of guardians. The sheriff's return bears date the twenty-fourth of October, one thousand eight hundred and fifty-seven, and does not allude to this paper, which is dated the fifth day of November, one thousand eight hundred and fifty-seven, several days after the sheriff had divested himself of the writ, and after the Court had been seized of his return. The record should account in some way for the appearance of that paper. Yet it is quite silent, not a word is to be found in the record of the proceedings to shew that that paper was ever legally placed on record. But if this paper is regarded, the Court must determine its value: To whom was the writ directed? The sheriff. Can any one but the sheriff, or his lawfully appointed deputy, execute a writ so directed? Could a bailiff of the Superior Court execute such a writ? Undoubtedly not. The return of a bailiff, unless acting within the special compass of his duty, is valueless and certifies nothing.

MERRITT, Justice :—This case comes before us upon an appeal from a judgment of the Superior Court, discharging a rule taken against the respondent, a guardian.

The facts are as follows :

The plaintiff in the Court below, now the appellant, impleaded one Edward Oliver in action for debt, and in

order to secure the payment of the amount due to him, the plaintiff sued out a writ of *saisie-arrest* before judgment, under which a ship called the *Melbourne*, of 1200 tons, and worth about £6000 currency, was seized.

The writ was returnable on the 26th of October, 1857, and on the 24th day of the same month, the sheriff made his return that he "had attached in the hands of Edward Oliver, (the defendant) a certain ship or vessel called "the *Melbourne*, as mentioned in the *procès verbal* of "seizure hereto annexed;" and in the *procès verbal* annexed to the writ, Jean Richard, the bailiff who executed the writ, declared "j'ai constitué pour gardien des dits "effets saisis, la personne de François Langlois, de Québec "galfat, et Jean Lachance, de Québec, charpentier."

By the final judgment in the said cause, the defendant was condemned to pay to the plaintiff £704.9, currency, with interest and costs; and the plaintiff having, in the usual course of law, sued out a writ of *venditioni exponas*, the sheriff made a return as follows.

"In obedience to this writ I proceeded to demand possession of a certain ship called *Melbourne*, seized under "a previous writ of *arrêt-simple* in this cause, from the "guardian, Thomas Hamilton Oliver, Esquire, of Quebec, "merchant, duly appointed by me as such guardian to "the above seizure, under the said writ of *arrêt-simple*, "which said Thomas Hamilton Oliver neglected and refused to deliver over to me the said ship *Melbourne*, "whereby I was unable to effect a sale thereof, as I am "commanded by this writ."

In the foregoing return, the sheriff speaks of the respondent, *as the guardian duly appointed by him*, the sheriff; but it is nevertheless true, that by the *procès verbal* of seizure annexed to the first return of the sheriff, it appeared, as already mentioned, that François Langlois and Jean Lachance were the guardians who had been named in this cause; and it also true that the sheriff had not previously to

the suing out of the writ of *venditioni exponas*, made any return to the Court, to the effect that the respondent had been named as guardian in the place of Langlois and Lachance.

We find however a *procès verbal*, in the record, signed by Jean Richard, the officer who executed the writ of attachment, in which that officer says : " En vertu de l'ordre
 " de William Smith Sewell, écuyer, shérif du district de
 " Québec, nous avons déchargé de la garde du bâtiment
 " *Melbourne*, saisi en cette cause, les personnes de Fran-
 " çois Langlois et Jean Lachance, gardiens à gages, et
 " avons constitué en leur lieu et place, la personne de
 " Thomas Hamilton Oliver, écuyer, de Québec, marchand,
 " en qualité de gardien volontaire, (c'est-à-dire sans gages)
 " lequel s'en est chargé, et a même répondu par corps de
 " les garder et de les livrer toutefois et quand il en sera
 " requis par moi, huissier, soussigné, et a le dit gardien
 " signé avec nous, lecture faite. " This *procès verbal*, which purports to be signed by the bailiff, his *recors*, and the respondent, bears date ten days after the writ was returnable, and twelve days after it had been actually returned into Court ; and although it has been returned to us, as one of the papers of the record, it is not marked as having been filed, or endorsed in any way ; and it does not appear when, how, or by what authority, it was placed on the record.

After the sheriff had made his return to the writ of *venditioni exponas*, as already mentioned, the plaintiff obtained a rule for *contrainte par corps* against the respondent as guardian.

He appeared by Counsel, but did not make any answer in writing ; and the appellant having submitted the case for judgment against the guardian, without any other evidence of his appointment than the documents already spoken of, the rule was discharged ; the reasons assigned in support of the judgement, so rendered, being as follows :

“Considering that the sheriff, by his return to the writ of *arrêt simple*, returns that he named two guardians other than the said Thomas Hamilton Oliver, and that after the return of the said writ, with his return thereto, the sheriff was *functus officio* in relation thereto, and had no authority over the seizure already made by him.

“Considering moreover that the certificate of the bailiff, attached to the said writ and return, and dated after the return of the said writ into this Court, cannot be looked to and is without legal effect. Considering that there is no legal evidence of the said Thomas Hamilton Oliver having been named guardian in this cause by any person having a right to name him, doth dismiss the plaintiff's motion for *contrainte par corps*, and the rule thereupon obtained, with costs against the said plaintiff in favor of the said Thomas Hamilton Oliver.”

It is from the judgment thus rendered that the present appeal has been instituted ; but although that judgment is very different from the one to which the appellant would, it seems, have been entitled, had the proceedings been regular, I nevertheless do not think that it is wrong ; because, (irrespective of any question as to the regularity or irregularity of the appointment of the respondent, or as to the regularity of the production of the *procès verbal* purporting to contain his appointment) I do not see that there is legal proof of the appointment of the respondent as guardian.

It is no part of the official duty of a sheriff's bailiff to make a return to this Court, as to what he does under a warrant from the sheriff. Richard's *procès verbal* is, in effect, such a return ; and it being no part of his official duty to make such a return, we cannot regard it as authentic.

But it may be said we have the sheriff's return to the writ of *venditioni exponas*. The objection to this part of the proof of the appellant is, that the sheriff cannot in his return to a writ of *venditioni exponas* issued in 1866, embody a re-

turn of his proceedings, under and by virtue of a writ of *saisie-arrest* issued in 1857. Moreover the certificate of the sheriff is not the best evidence of the appointment of a guardian. The best evidence of such an appointment is the *procès verbal* by which it was made ; and the *procès verbal* itself ought to be certified to the Court by the officer to whom the writ was addressed. In the present case we have before us a paper that purports to be the *procès verbal* under which the respondent was appointed ; but that document has not been produced before us, and certified to us, by the officer who had power to do so, namely, the sheriff.

The appellant contends that the respondent has been deprived of any right to make the objections to which I have alluded by the manner in which he appeared in the Court below, and by the order of Mr. Justice Taschereau directing the parties to proceed to evidence as to the value of the ship seized.

I do not, however, think, that the respondent can be held to have made any admission, or to have waived any right, by any of his proceedings in the Court below ; and I think it plain that the order of Mr. Justice Taschereau, directing the parties to proceed to evidence, as to the value of the vessel seized, could not relieve the appellant from the necessity of establishing, by legal evidence, the fact of the appointment of the respondent as guardian.

I therefore concur in confirming the judgment of the Court below, because I do not think it has been legally proved that the respondent was appointed guardian, and as such obtained possession of the ship seized ; but if that fact were legally proved, even if there were an irregularity in the appointment, I would not allow the person appointed, and who therefore voluntarily placed himself in the position of an officer of the Court, to dispose, as he might think fit, of the property coming into his possession by reason of such appointment, merely in consequence of an irregularity on the part of an officer of the Court, in which the respondent

himself concurred, and in order to avoid difficulty hereafter, I think we ought expressly to reserve to the plaintiff his recourse.

The Court, &c., Considering that it is not established by legal evidence, that the said respondent was appointed guardian in this cause, and, therefore, that in the judgment of the Court below, in so far as it dismisses the motion of the appellant for *contrainte par corps*, and the rule thereupon obtained, with costs in favor of the said respondent, there is no error; doth in consequence confirm the said judgment, to wit, the judgment rendered by the Superior Court, at Quebec, on the thirty-first day of December, one thousand eight hundred and sixty-one, with costs in this Court, in favour of the respondent, and against the appellant, the Court reserving to the appellant any recourse he may by law be entitled to against the respondent, by reason of the matters and things in the said motion and rule alleged, &c.

HOLT and IRVINE, for appellant.

ALLEYN, R. for respondent.

SUPERIOR COURT.—BEDFORD.

Before :—McCord, Justice.

No. 833.	{	RUITER.....	<i>Plaintiff.</i>
		vs.	
		THIBAÛDEAU.....	<i>Defendant.</i>
		and	
		TORRANCE.....	<i>Opposant.</i>

Held.—That on a contestation by the plaintiff of an opposition by which the opposant claimed the land seized in the cause, as proprietor, the plaintiff is not entitled to invoke the possession of the defendant to whom he sold the land, in order to make up the ten years possession and prescription, under the 15th article of the Custom of Paris.

Jugé :—Que sur contestation par le demandeur d'une opposition par laquelle l'opposant réclamait la terre saisie dans la cause, comme propriétaire, le demandeur n'a pas droit d'invoquer la possession du défendeur, afin de compléter la possession et prescription de dix ans, en vertu de l'article 115 de la Coutume de Paris.

Judgment rendered the 13th October, 1863.

This was an opposition filed by Andrew Torrance, claiming to be the owner of the land seized in the cause, by

virtue of a deed of sale from the sheriff of the district of Montreal, to his father Thomas Torrance, bearing date on the 2nd December, 1819, the opposant setting up title under the last wills and testaments of his father and mother.

The plaintiff contested this opposition, and amongst other *moyens* of contestation alleged, in effect, that at the time of the seizure of the land in this cause, on the 30th June, 1862, the defendant, in whose possession it was seized, had, as well by himself as by his *auteur*, the plaintiff, enjoyed and possessed the land *à juste titre et de bonne foi, publiquement et sans inquiétation*, for upwards of ten years immediately preceeding the date of the seizure, the opposant being present, of full age, and not privileged, whereby the defendant had acquired a title to the land by prescription. That on the 3rd July, 1848, by deed of sale before notaries, Hermanus Ruiter sold the land in question to the plaintiff, who possessed it from thence as proprietor, in good faith, freely, openly and publicly, without molestation or trouble, up to the 22nd of June, 1858, on which day, by deed of sale before notaries, the plaintiff sold the land to the defendant who thereupon took possession of the same. That the first mentioned deed from Hermanus Ruiter, to the plaintiff, was duly enregistered on the 11th of July, 1848, and the latter from the the plaintiff to the defendant, was also enregistered. By his conclusions the plaintiff invoked the benefit of the prescription of *dix ans, entre présents*, &c., and prayed the dismissal of the opposition.

The opposant filed an answer *au fonds en droit* to this contestation, for the following amongst other reasons :

1st. Because it did not appear by the said contestation that the plaintiff possessed the land, *tant par lui-même que par ses prédécesseurs*, for a period of ten years :

2nd. Because it thereby appeared, on the contrary, that the plaintiff so possessed the said land only from the 3rd July, 1848, up to the 22nd June, 1858, when his possession ceased :

3rd. Because the plaintiff could not in law avail himself of the alleged possession of the defendant, but could only claim a possession of ten years by himself, or his *prédécesseurs*, not his successors and *ayant cause*.

Answer general.

The Court maintained the answer in law and dismissed the contestation with costs.

CORNELL and RACICOT, for opposant.

O'HALLORAN and BAKER, for plaintiff contesting.

QUEEN'S BENCH } DISTRICT OF MONTREAL.
APPEAL SIDE. }

Before:—SIR L. H. LaFontaine, BART., Chief-Justice,
AYLWIN, DUVAL and CARON, Justices.

CASTONGUAY, *Appellunt.*
and

CASTONGUAY *Respondent.*

Held:—1o, That, in the case submitted, the donation to the plaintiff created a substitution *fidéicommissaire*.

2o. That a tutor to a substitution, impleaded in that capacity, represents all the *appelés* to the substitution in a case where such *appelés* are not mentioned by name in the instrument creating the substitution.

3o. That the clause in the donation permitting the alienation of the *fonds*, à *constitution de rente*, in case it were found by *experts* to be advantageous to the children of the donee, will be carried into effect by the Court on such report of *experts*, in an action by the donee praying to be authorized to sell, although the donee had no children, and was not likely to have any.

Jugé:—1o. Que, dans l'espèce, la donation au demandeur contenait une substitution *fidéicommissaire*.

2o. Que le tuteur à une substitution, poursuivi en cette capacité, représente tous les *appelés* à la substitution dans le cas où tels *appelés* ne sont pas mentionnés nommément dans l'acte contenant la substitution.

3o. Que la clause dans la donation permettant l'aliénation des fonds, à constitution de rente, dans le cas où il serait, sur expertise, trouvé avantageux aux enfants du donataire, sera mise à exécution par la Cour sur rapport d'*experts*, dans une action par le donataire concluant à être autorisé à vendre, quoiqu'il n'eût aucun enfant, et qu'il ne fût pas probable qu'il en aurait.

Judgment rendered the 10th March, 1857.

This was an action brought by a donee under a deed of donation to him, of the 14th May, 1827, from his mother, and

was directed against a tutor to the substitution to be allowed to sell, à *constitution de rente*, part of a large piece of land lying within the City of Montreal, described in the donation.

The pleas of the defendant were to the effect :

1o. That the *appelés* to the substitution should have been brought into the cause, and that the tutor to the substitution could not legally represent individuals of full age, but only children unborn.

2o. That there was no allegation that the plaintiff had any children, but that on the contrary it was admitted he had none, and that, therefore, he could not be justified in demanding that *experts* should be named to report whether it was, or was not, advantageous to such children to be allowed to sell the property in question.

3o. *Défense au fonds en fait.*

The case was inscribed for hearing *en droit* on the exceptions, and, on the 28th November, 1845, the exceptions were dismissed, and the action held to be regularly brought, all the *appelés* being held to be represented by the tutor to the substitution.

The case having been heard on the merits, the Court below rendered judgment on the 29 January, 1846. (Valières, C. J., Rolland, Gale, Day, J.) "Considering that the plaintiff has proved his right of action," ordered that *experts* be named to visit the premises and report "whether it would be advantageous to the children of the plaintiff, or to those who might afterwards be *appelés à recueillir la substitution*, to sell à *constitution de rente*."

The following extracts from the donation had given rise to the question as to whether there was, in fact, a substitution, a point upon which some doubt was expressed in the

Court below, and upon which the opinion given by M. Justice Rolland principally referred.

“ Et la dite Dame donatrice désirant conserver aux enfants à naître en légitime mariage du dit donataire, seulement, la propriété pleine et entière des biens ci-dessus désignés, sans l’étendre à un degré plus éloigné, veut et entend que les biens ci-dessus donnés en jouissance au dit donataire demeurent substitués, comme elle les substitue par ces présentes, aux dits enfants à naître en légitime mariage du dit donataire, seulement, auquel elle donne la propriété des dits biens, ce qui a été accepté pour eux par le dit donataire, leur père, voulant et entendant que ceux qui sont appelés à la présente substitution soient saisis des biens ainsi substitués, aussitôt que le cas de la substitution sera venu, sans qu’ils soient obligés d’en faire demande en justice ; et dans le cas de mort du dit donataire sans enfant, la jouissance et l’usufruit des biens à lui présentement donnés seront reversibles à ses frères et sœurs, ou à aucun d’eux, pour par eux en jouir leur vie durant ; et si au décès du dit donataire sans enfants tous ses frères et sœurs étaient décédés, la propriété des dits biens retournera et appartiendra à leurs enfants nés et à naître, pour être partagés entr’eux par souches. La présente donation et substitution est ainsi faite, par la dite Dame donatrice, parceque tel est son bon plaisir, et sa volonté ; et pour conserver la propriété des dits biens aux enfants du dit donataire, comme il est dit plus haut, et en outre à la charge par le dit donataire de payer à la dite Dame donatrice, par chaque année sa vie durant, à compter de ce jour une somme de vingt-cinq livres cours actuel, par forme de rente et pension alimentaire, payable &c. ”

“ La présente donation est encore faite aux charges, clauses et conditions ci-après exprimées, savoir : que le dit donataire ne pourra transporter à aucune personne étrangère la jouissance et usufruit des dits biens pendant le

“ temps de sa jouissance, mais qu’il sera tenu d’en percevoir
 “ les fruits et revenus pour son propre bénéfice et avantage,
 “ sans pouvoir les dits fruits et revenus être saisis par
 “ aucun des créanciers du dit donataire ; que le dit dona-
 “ taire pourra vendre, à constitution de rente seulement, le
 “ tout ou partie du terrain complanté d’arbres fruitiers dési-
 “ gné en ces présentes, si par experts et gens à ce connais-
 “ sants cela est jugé avantageux pour ses enfants, &c. ”

ROLLAND, Justice, on the hearing *en droit* said :—La cause était inscrite sur les exceptions, la Cour ne peut que les débouter, donnant pour motifs que l’action est régulièrement intentée contre le tuteur à la substitution ; et que la naissance d’enfants au demandeur, n’est point un fait nécessaire pour la présente demande. (1)

Il en eut été autrement si le substitué était désigné par son nom, car alors il aurait fallu l’appeler, et s’il était mineur, lui faire élire un tuteur, mais dans le cas d’une substitution *fideicommissaire*, comme la présente, où la personne qui en profitera n’est pas connue, il faut un tuteur à la substitution. Rien n’empêche les intéressés d’intervenir, quoique n’ayant qu’un droit éventuel.

Le défendeur a été nommé tuteur à la substitution, en sorte qu’il n’est pas vrai de dire qu’il ne représente que des enfants à naître du défendeur, comme il est allégué par erreur dans les défenses. (2)

ROLLAND, Justice, upon rendering final judgment :—Cet acte ne peut contenir qu’une *substitution*, car pour qu’il y eut une donation de la propriété avec jouissance après la mort du demandeur, supposé qu’il n’eût qu’un simple usufruit, il faudrait une acceptation, ce qui manque. L’on ne peut supposer que la donatrice voulait faire un acte qui ne pouvait avoir de suite, exprimant une volonté sans aucun but, ni efficacité, ce serait donc un usufruit avec rétentention de la propriété.

(1) Thévenot, Ch. 88.

(2) 5 Pothier, p. 608 :—Arrêts d’Augeard, p. 339 :—Arrêt du 14 Août, 1700.

Mais référant aux termes de l'aete on les trouve clairs et précis. C'est le langage ordinaire des substitutions, et voici ce que dit Pothier. " La principale règle est qu'on " doit rechercher ce qu'a voulu l'auteur de la substitution, " sans s'attacher aux termes. " C'est en conséquence de cette règle qu'il a été jugé, par arrêt du 16 juin, 1719, rapporté au 7^{me} Tome du Journal, et par Augeard, que les termes dont se servent les Notaires *ignorants* dans les substitutions, que celui qui en est grevé n'aura que l'usufruit des biens substitués, n'empêchent pas que le grevé ne dût être considéré comme propriétaire de ces biens, et que le terme d'usufruit employé dans le testament doit s'entendre, non d'un usufruit proprement dit, mais d'un droit de propriété qui, au moyen de la substitution, devait s'étendre et se résoudre en la personne du grevé à sa mort, et qui à cause du rapport avec l'usufruit qui s'éteint de même avait été appelé usufruit.

Thévenot, Des Substitutions, Ch. 1 et 3, donnant les résultats de sa définition de la substitution *fidéicommissaire* dans les paragraphes précédents, No. 18 dit : " Il " en résulte qu'il faut qu'il y ait deux donations, deux " libéralités faites par l'auteur de la disposition ; l'une " au profit de celui qui doit rendre ; et l'autre au profit " de celui à qui l'on doit rendre. " Au No. 19. " Il s'en " suit encore, que ces deux donations doivent être *successives* ; le second donataire ne devant recueillir " qu'après le premier. " Au No. 31. " Finalement il en résulte que celui qui est chargé de rendre n'a point en " général la liberté indéfinie d'aliéner, &c. "

Au Ch. XI. Termes par lesquels on peut substituer.

No. 176. 1o. " Point de termes marqués. "

No. 180. 2o. " Il faut des termes dispositifs, et non simplement énonciatifs. "

No. 183. 3o. " Peu importe que les termes soient impropres, s'il résulte suffisamment de la disposition, qu'on " a voulu substituer *fidéicommissairement*. "

No. 190. 4o. " Il faut que les termes emportent trait de " temps. "

No. 199. 5o. " Il faut que les termes emportent l'ordre " successif. "

No. 206. 6o. En explication. " Posons qu'il soit dit dans " une donation entre vifs, *je donne à un tel*, et à ses enfants " à naître cela formerait-il un *fidéicommiss* en faveur des " enfants à naître ? Oui ; car le père était saisi par la do- " nation, et les enfants ne pouvant l'être, parce qu'ils " n'existent pas, il en résulte nécessairement l'ordre suc- " cessif. No. 207. La propriété ne pouvant être en suspens, " le père est le propriétaire de tout, à la charge de rendre à " ses enfants s'il lui en survient. "

No. 212. 7o. Mots. " Je substitue, terme ordinaire, et " après sa mort *je substitue*. "

Dans le cas actuel, le langage de la donatrice ne laisse aucun doute quant à l'intention de créer une substitution et un ordre successif. Il y est dit : " Je donne à mon fils la jouissance, et désirant conserver aux enfants à naître du dit donataire, seulement, la propriété pleine et entière du bien ci-dessus désigné, sans l'étendre à un degré plus éloigné, je veux et entends que les biens ci-dessus donnés en jouissance au dit donataire *demeurent substitués, comme je les substitue* par ces présentes, aux dits enfants à naître, auxquels je donne la propriété des dits biens, qui a été acceptée pour eux par le dit donataire, leur père, voulant et entendant que ceux qui sont appelés à la présente *substitution* soient saisis des biens ainsi substitués, aussitôt que le cas de la substitution sera venu &c. "

Voilà bien, ce semble, le langage de la substitution *fidéicommissaire*, v. 10 Ricard : Domat, p. 199. Au No. 225. Chevenot observe que ce mot *je substitue* employé dans une donation entre vifs ne pouvait en général convenir qu'à la substitution *fidéicommissaire*, et il ajoute au No. suivant :

“ En effet, le premier gratifié étant *saisi*, il est clair que la substitution ne peut alors trouver prise. ”

Il est évident que si la donation ne contenait pas une substitution, elle ne peut valoir comme donation de propriété aux enfants à naître, ni à d'autres qui ne sont pas parties acceptantes à l'acte.

RICARD, Tr. des Donations, p. 199. S'ils étaient deux qui fussent premiers donataires, comme dans le cas où l'usufruit est donné à l'un, et à l'autre la propriété, et qui dussent prendre la chose donnée par ses mains, l'acceptation de l'un ne profiterait pas à l'autre, et la donation quoique faite par un même acte, serait valable au profit de celui qui aurait accepté, et nulle pour le regard de l'autre.

L'on n'a pas prétendu ici que le demandeur fût un simple usufruitier, si c'était le cas, et qu'il n'y eut pas de substitution, tout le bien à la mort de la mère donatrice pouvait bien retourner à la masse ; certes cela changerait bien la position des enfants, et les frères et sœurs du demandeur n'ont guères compris leurs droits. Mais qu'est-ce qu'une donation entrevifs d'un usufruit à vie sans substitution ? L'on ne trouve cela nulle part, si c'est donation entrevifs la propriété a dû, ce semble, être donnée. Si elle n'a pas passé au donataire, quel effet aura la donation après le décès du donateur ? Or, évidemment, personne ne peut profiter de cette donation que la partie acceptante. Elle est caduque quant aux enfants à naître ou aux frères et sœurs du donataire, à moins d'une substitution en ordre successif.

La propriété ne peut pas être en suspens, elle serait donc demeurée à la donatrice. Or que s'en suit-il ? C'est que l'usufruit ne peut durer que le temps de sa vie. Car aussitôt sa mort, la propriété passe à ses héritiers, et l'on ne peut pas, je crois, prétendre que la donation d'usufruit aurait un effet au delà de son décès, puisqu'elle n'a pas les forma-

lités du testament pour la validité des dispositions à cause de mort.

Tout le monde sait qu'un bien substitué peut se vendre quelques fois pour des causes utiles, et généralement pour des causes nécessaires, lorsque celui qui a créé la substitution n'a pas déclaré quels seraient les cas où les immeubles pourraient s'aliéner. Mais quand le donateur a exprimé sa volonté, *il faut la suivre*, et je ne connais aucune différence entre les legs et les donations à cet égard. Les legs ne sont que des donations, et le donateur peut mettre toutes conditions à sa libéralité. La seule question serait de savoir, admettant qu'il y ait substitution, *si c'est ici le cas voulu par la mère du donateur ?* Nous avons déjà jugé la question par notre interlocutoire, et s'il ne s'agissait que de constater un fait, l'utilité de la vente, le rapport d'experts l'établit.

La seule objection qui ait été faite par le défendeur, est le défaut d'enfants, et l'improbabilité qu'il en naitra. Mais comme cette objection n'est soutenue d'aucune autorité, nous en avons déjà disposé, et je ne vois aucune raison d'en dévier.

Je crois apercevoir quelque chose de favorable dans cette demande. C'est l'intention présumée d'une mère que son fils eut une vraie jouissance de ses biens, cela pour sa subsistance, sa vie durant. Il est le premier gratifié. C'est lui que la donatrice a préféré. C'est pourquoi prévoyant que ces biens (un verger en particulier) pourraient ne donner aucun revenu, elle a dû permettre l'aliénation, mais on dit qu'elle ne l'a voulu que pour *l'avantage de ses petits enfants*.

Mais n'est-il donc pas de l'avantage des enfants de son fils, que leur père ne soit pas dans l'indigence, et qu'il puisse leur laisser une succession. Si la jouissance des biens substitués ne lui profite pas, tandis qu'en les vendant ils produiraient des revenus considérables, sans que le fonds

diminuât, (puisqu'il est question d'assurer les capitaux) le père ne pourra-t-il pas s'enrichir et les enfants profiter ?

Il paraîtrait que le demandeur n'a point d'enfants, l'on dit même qu'il est probable qu'il n'en aura jamais, et c'est dans l'intérêt des parents *collatéraux* que l'on voudrait que le fils de la donatrice n'ait qu'une jouissance *nominale sans profits*, afin que ce bien, qui est susceptible d'augmenter de valeur, (étant dans l'enceinte d'une ville) demeure aux soins du grevé, et qu'il le leur conserve sans en retirer lui-même aucun revenu.

Telle n'était pas suivant moi l'intention de la mère donatrice.

Pour résumer, je trouve qu'il y a *substitution*, et que le demandeur est le grevé, chargé de rendre les biens à sa mort à ceux que sa mère lui a substitués. Je ne puis concevoir l'idée d'un usufruit simple, par donation entrevifs, sans aliénation de la propriété. Et les termes de l'acte, (ou le mot *usufruit* ne se trouve même pas) me semblent rencontrer tout ce que les auteurs ont dit de la manière dont on crée une substitution *fidéicommissaire*. Quant à l'objection tirée de ce qu'on ne doit aliéner les biens substitués que dans certains cas voulus par la loi, cela n'a aucune application au cas actuel.

Il est une autre règle, Thévenot, C. 48, p. 255, 1. No. 787, se fait cette question. "Est-il de l'essence de la substitution *fidéicommissaire*, que le grevé n'ait pas liberté indéfinie d'aliéner ?" Et il répond ; "Non, le substituant peut permettre l'aliénation *indéfinie*. Une substitution qui contiendrait cette clause serait valable." Voy. Rep. vbo. Substitution, sect. IX, p. 495. "La volonté de celui qui dispose est la loi suprême dans les *fidéicommiss*."

C'est aller plus loin qu'il ne faut, mais qui a jamais douté qu'un donateur, (par donation entrevifs) comme un testateur, peut donner ou permettre l'aliénation des biens

en certains cas qu'il définit, surtout lorsqu'il assure les fonds ou capitaux aux substitués. Tous les jours nous agissons d'après cette idée, que le testateur ou donateur peut mettre à sa libéralité telles conditions qu'il lui plait. Et des légataires grevés ont été souvent autorisés à vendre suivant les directions du testateur ; ce n'est pas une doctrine nouvelle.

Il ne s'agit donc que d'exécuter dans le cas actuel la volonté de la donatrice. Je n'ai rien entendu à ce sujet qui puisse me faire croire, que, par notre interlocutoire, nous avons donné une fausse interprétation à la donation, et j'y persiste.

Il n'est pas hors de propos de référer à une décision de cette Cour, en avril, 1844, sur la demande de Mad. Barron, pour mettre en vente des biens dont elle n'était que l'usufruitière. Là, en refusant d'acquiescer à cette demande, la Cour s'est expliquée, disant que le simple usufruitier ne pouvait pas se fonder sur la loi qui permet au grevé de vendre les biens substitués en certains cas, comme des immeubles qui dépérissent, des maisons caduques, et à la réparation et reconstruction desquelles les biens substitués ne peuvent fournir. Rep. vbo. Subst. sec. XXXI. §1. p. 527. 1 Col.) Le grevé comme propriétaire ayant droit de jouir d'un bien productif, tandis que l'usufruitier n'a que la jouissance du bien tel qu'il est, et aucun droit dans le fonds qui est inaliénable dans son intérêt, comme bien d'autrui.

Et si je sais d'avis ici de permettre la vente, c'est parce que je considère le demandeur propriétaire grevé de substitution, et que l'intérêt même du grevé est à considérer comme le premier gratifié, surtout si c'est un enfant de la donatrice. La donatrice a voulu qu'on consultât l'intérêt des substitués, *à la bonne heure*. Et je trouve que l'aliénation proposée est aussi dans leur intérêt. Je constate le fait de la manière que la donatrice l'a voulu par experts et gens à ce connaissant.

Lacombe, Jurisp. Civile, vbo. Substitution, partie 2, sect. 4, No. 5, p. 247.

En quel cas biens substitués peuvent être aliénés, p. 247, et peuvent être hypothéqués.

2 Prudhon, des Droits d'Usufruit, No. 516.

Judgment in appeal : Considering that in the judgment appealed from there is no error, the Court doth confirm the same, with costs.

GIARD, for appellant.

CHERRIER, DORION and DORION, for respondent.

SUPERIOR COURT.—BEDFORD.

Before : McCORD, Justice.

No. 143. *Ex parte*, CHURCH,..... *Petitioner*.

Held,—1o. That the delay intervening between the service of a writ of summons issued from a magistrates Court at three o'clock P. M., and the return of the writ on the following day at ten A. M., is insufficient, and that, under the circumstances of the case, the plaintiff could not legally proceed to judgment, *ex parte*, on the return day, the defendant not appearing.

2o. That a writ of *certiorari* will be granted to remove a conviction to the Superior Court, notwithstanding that the writ of *certiorari* is taken away by the statute under which the conviction was had.

Jugé :—1o. Que le délai entre la signification d'une sommation émanée d'une Cour de juges de paix à trois heures de l'après-midi, et le rapport du writ le jour ensuivant à dix heures du matin, est insuffisant, et que, dans les circonstances de la cause, le demandeur ne pouvait pas procéder légalement à jugement, *ex parte*, le jour du rapport, le défendeur ne comparaisant pas.

2o. Qu'un writ de *certiorari* sera accordé pour faire transmettre une conviction à la Cour Supérieure, nonobstant que le writ de *certiorari* soit prohibé par le statut en vertu duquel la conviction a eu lieu.

Judgment rendered the 23rd October, 1863.

The Collector of Inland Revenue (formerly styled Revenue Inspector) for the district of Bedford, prosecuted the present applicant under the Consol. Stat. of L. C., Ch. 6,

for selling liquor without license. The defendant made default, and the plaintiff obtained, *ex parte*, a conviction for \$50 and costs, &c., on the 7th July, 1863, before three Justices of the Peace, at Granby, in the said District.

The defendant, on the 13th October, 1863, moved for a writ of *Certiorari* to remove the conviction to the Superior Court, and amongst other reasons set forth in his *affidavit* of circumstances, he alleged that the writ of summons and declaration in the said cause were served upon him at about three o'clock in the afternoon, the 6th day of July, then last, at his domicile, at a distance of about 20 miles from the place where he was by the writ ordered to appear on the following day, (7th July) at ten of the clock in the forenoon; that no sufficient and reasonable delay was thereby given him; that the Justices of the Peace had no right to, and could not, proceed *instantly*, and in his absence, and that the said conviction so rendered by them was illegal and unjust.

In support of his pretensions the applicant filed copies of the record of proceedings before the magistrates, including copy of the bailiff's return, and a certificate of the defendant's default, whereby it appeared that the above facts were correctly stated in the *affidavit*. The statute in question made no provision as to the delay to be granted in such cases between the service and return of the writ.

Writ granted on the ground that no reasonable delay to appear was given to the defendant.

CORNELL & RACROT, for petitioner.

HUNTINGTON & LAY, for Cowie.

SUPERIOR COURT.—BEDFORD.

Before : McCord, Justice.

No. 581. { HASE, *et al* *Plaintiffs*,
 vs.
 { MESSIER *Defendant*.

The purchaser of a lot of land, upon being sued for a balance of the *prix de vente*, alleged and proved that the land was originally granted by letters patent to A. B., and others, and was afterwards sold to the plaintiff without any warranty, except as to his own acts and deeds, by a person who failed to shew any connection of titles between himself and the patentees, or any persons claiming through them :

Held.—That a purchaser so sued is not entitled to obtain from the plaintiff the security provided by the 23 Vic., chap. 59, sec. 18.

L'acquéreur d'une pièce de terre, pour suivi pour la balance du prix de vente, allégué et prouva que la terre avait été originairement concédée par lettres patentes à A. B., et autres, et subéquemment vendue au demandeur sans garantie, excepté quant à ses faits et promesses, par un individu qui n'avait pu établir aucune connexité par titres entre lui et les concessionnaires originaires, ou entre aucunes autres personnes :

Jugé :—Qu'un acquéreur ainsi pour suivi n'a pas droit d'obtenir du demandeur le cautionnement pourvu par la 23 Vic., cap. 59, sec. 18.

Judgment rendered the 23rd October 1863.

The plaintiffs alleged in their declaration that on the 17th October, 1861, by deed of sale before notaries, they sold the piece of land in dispute to the defendant, for the sum of \$900, of which they had received \$150, and concluded against the defendant for the instalments due at the date of their action, to wit, \$289.

The defendant pleaded in effect that by the said deed of sale the plaintiffs had sold the said piece of land to him with promise of warranty against all troubles, evictions, alienations, and other hindrances generally, whatsoever ; that the defendant had ascertained, since the date of the deed, that the said land was, on the 27th March, 1827, granted by the Crown to Catherine Sax, and others, and produced a certificate of the letters patent signed by the deputy registrar of the Province ; that long afterwards, to wit, on the 16th May, 1860, the land in question was, by deed before notaries, sold to one James Hase, by one Ebenezer Martin, without stating in the deed from whom he derived any title to the said land, but, on the contrary,

stating that he sold it with *guarantee, except as to his own acts and deeds only.*

That by virtue of the premises, the defendant feared that the plaintiffs were not, at the date of their deed of sale to the defendant, the lawful owners of the land, and had just cause to fear that he, the defendant, would be troubled by petitory actions on the part of the owners. Conclusions, that the plaintiffs, before being able to execute their judgment, be ordered to give the defendant good and sufficient security that he should not be troubled by any claim of title to the lot.

Answer general.

In support of his pretensions, the defendant produced the certificate of letters patent above mentioned, an authentic copy of the deed of sale from Martin to James Hase, and the plaintiffs' admission as to the identity of the piece of land granted by letters patent, and subsequently sold by Martin to James Hase, and afterwards by the plaintiffs to the defendant.

It was contended on behalf of the defendant, that he was entitled to the security referred to in the 23rd Vic., cap. 59, sec. 18, which is in the following terms: "If the purchaser of any real property is troubled or has just cause to fear that he will be troubled by any hypothecary or revendicatory action, he shall be entitled to delay the payment of the purchase money until the vendor has removed such trouble, unless the vendor prefers to give security....."

RACIOT, for the defendant, contended that the defendant could not ascertain, and the plaintiffs refused to shew, how and by virtue of what titles they were in the rights of the original grantees; that this refusal or neglect of the plaintiffs to exhibit their deeds, if they had any, and the absence of such deeds formed *prima facie* evidence that, at the date of the deed to the defendant, they were not the lawful owners.

of the land ; that a suspicion was also created by the form of the clause as to the warranty above referred to, and that the defendant therefore had just reason to fear that he would be troubled by revendicatory actions as mentioned in the statute. That if the plaintiffs, at the time of the sale, were the true owners of the land, there was no hardship in their being ordered to give the required security, in default of their shewing by what chain of titles they had acquired the land. That under the circumstances the defendant was justified in claiming the security provided by the statute above cited, and that if sued by the original grantees or persons claiming under them, the defendant would have no means of shewing title in his vendors.

O'HALLORAN, for plaintiffs, argued that the plaintiffs were not bound to shew to their purchaser, the defendant, the whole chain of titles from the original patentees, and that the present case did not come under the provisions of the statute referred to ; that the defendant, in order to establish " the trouble or just cause to fear trouble," contemplated by that law, should have either shewn an actual revendicatory action instituted against him, or at least a threat or notice on the part of some third party to institute such an action ; that if the defendant had been desirous of examining the plaintiffs' titles, he should have done so before signing the deed given to him.

The Court gave judgment for plaintiffs, without ordering security to be given.

O'HALLORAN and BAKER, for plaintiffs.

CORNELL and RACICOT, for defendants.

QUEEN'S BENCH, }
APPEAL SIDE. } DISTRICT OF MONTREAL.

Before :—SIR LOUIS H. LAFONTAINE, BART., Chief-Justice,
MEREDITH, MONDELET and BADGLEY, Justices.

SMITH, *et ux*.....*Appellants.*
and
PATTON.....*Respondent.*

Held :—That the Circuit Court has no jurisdiction in an action for an alimentary allowance of \$200, per annum, sought to be recovered for an indefinite period, namely, during the plaintiff's life time ; and that the judgment of the Circuit Court awarding £28, per annum, during the plaintiff's life, will be reversed, and the plaintiff's action dismissed.

Jugé :—Que la Cour de Circuit n'a pas juridiction dans une action pour aliments au montant de \$200, par année, réclamés pour une période indéterminée, savoir, pendant la vie durante de la demanderesse ; et que le jugement de la Cour de Circuit accordant £28, par année, la vie durante de la demanderesse, sera infirmé, et l'action de la demanderesse renvoyée.

Judgment rendered the 7th December, 1863.

The action was brought *in formâ pauperis*, by the plaintiff, an aged and infirm woman, against her son in law and his wife, the daughter of the plaintiff, for an alimentary allowance and maintenance. By the conclusions of her declaration the plaintiff prayed : “ that the defendants be jointly and severally condemned to pay and satisfy to the plaintiff the sum of £50, currency, each and every year, as and for a life rent, the same payable quarterly. ”

The plea alleged, in effect, that the plaintiff had certain rights in real estate described in the plea, and that the defendants were willing to allow \$60 to the plaintiff, *per annum*, on obtaining a transfer of the rights in the real estate referred to.

By judgment rendered on the 28th May, 1863, (LaFontaine, J.) the defendant was condemned to pay the plaintiff “ the sum of twenty eight pounds, currency, each and “ every year, as and for a life rent during the life time of the “ said plaintiff, the whole with costs. ”

From this judgment an appeal was instituted on the

ground, first, of the excess of jurisdiction (1). Next, that the defendants were condemned jointly and severally, whereas it was contended that if the daughter died, her husband ought not to be held personally for the *rente*.

BURROUGHS contended that the appeal must be dismissed, because it was not certain, from the judgment, that the defendant would be liable for a sum exceeding £50 currency, as she might die at any time ; and because as the evidence in the Court below was not taken in writing, there could be no appeal ; and because no plea to the jurisdiction had been filed.

Judgment in appeal :—" Seeing that the Circuit Court hath jurisdiction to take cognizance of and determine civil suits and actions wherein the sum of money or the value of the thing demanded does not exceed two hundred dollars ; seeing that the action and demand in this cause is for an annual life rent of two hundred dollars to be payable during an undetermined period, namely, during the life time of the said plaintiff ; seeing that the said action and demand are and were in excess of the said limited jurisdiction of the said Circuit Court, and that in the rendering of the judgment, in this cause, by the said Circuit Court, there was error, doth set aside the said judgment ; and this Court proceeding to render the judgment which should have been rendered by the said Circuit Court, doth dismiss the said action and demand of the said plaintiff in the said Court, respondent herein, for want of jurisdiction in the said Circuit Court, to take cognizance of the same, without costs."

ELLION, for appellants.

BURROUGHS, for respondent.

(1) The Circuit Court shall have cognizance of, and shall hear, try and determine all civil suits or actions wherein the sum of money or the value of the thing demanded does not exceed two hundred dollars.—Cov. Stat. L. C., cap. 79, sec. 2.

COUR DE CIRCUIT.—QUÉBEC.

Présent :—TASCHEREAU, Juge.

No. 144. { BOILY,..... *Demandeur*,
 { vs.
 { VEZINA,..... *Défendeur*.

Jugé :—Que le propriétaire d'une maison louée à plusieurs locataires, n'est pas responsable des dommages que l'un de ses locataires peut souffrir des actes ou voies de fait d'un autre des dits locataires.

Held :—That the proprietor of a house leased to several lessees, is not responsible for the damages which one of the lessees may suffer by reason of the acts or voies de fait of another of the said lessees.

Jugement rendu le 25 février, 1864.

L'action était intentée par un locataire contre son propriétaire pour £15 de dommages, allégués avoir été soufferts par lui, et les membres de sa famille, en raison d'une grande quantité d'eau qui traversait continuellement le plancher de haut, et qui, tout en détériorant ses meubles, causait de graves maladies aux membres de sa famille, et ce, au su et connaissance du locateur. Pour soutenir cette action, le demandeur produisit son bail qui lui donnait "une partie du bas d'une maison," avec les conventions ordinairement stipulées dans cette espèce de contrat ; il produisit en outre un protêt notarié contre le défendeur, et établit la valeur des dommages soufferts, au moyen de témoignages. Le défendeur, par son plaidoyer, niait qu'il fût responsable envers le demandeur sur aucun des faits allégués, prétendant que les inconvénients et dommages soufferts par le demandeur étaient par le fait d'une personne habitant l'étage supérieur de la maison, et sur laquelle il n'avait aucun contrôle, et ne résultaient d'aucun vice dans la construction de la maison en question, laquelle était dans le meilleur ordre possible.

TASCHEREAU, Juge.—Le demandeur occupait, sous bail notarié, le bas de la maison du défendeur, laquelle était en bon état de réparations, et le défendeur s'était conformé à toutes les conditions requises par le bail. Le demandeur

savait au temps qu'il prit la maison, qu'il y avait d'autres locataires que lui, et les inconvénients que le demandeur a prouvé avoir souffert provenaient de la négligence de l'un de ces locataires. La question qui se présente maintenant est une question de droit. "Le propriétaire d'une maison est-il responsable pour les actes de son locataire?" Le défendeur, par son bail consentit en faveur du demandeur, est tenu de faire jouir le demandeur, ceci renferme l'obligation de le mettre en possession, de le garantir et de le défendre contre toute voie de droit. Je crois que le fait dont le demandeur se plaint est une voie de fait pour laquelle le défendeur n'est pas responsable ; c'est sans son consentement ou connaissance qu'elle a eu lieu, et il ne devrait pas en souffrir les conséquences. Je serais disposé d'assimiler cette question à celle d'un voisin ou co-locataire qui souffre des dommages par un incendie causé par la négligence ou faute de son voisin ou locataire. Les autorités citées, lors de l'argument, sont assez formelles sur ce sujet :

11 Toullier, No. 171 : "Celui d'entre les locataires qui est présumé seul en faute, parce que les autres ont prouvé qu'ils n'y sont pas, est tenu des dommages et intérêts, non-seulement envers le propriétaire, mais encore envers les autres locataires qui ont souffert du dommage par l'incendie de leurs meubles arrivé par sa faute." Et à la note 2.

Pothier, Louage, No. 81 : "Il y a différentes espèces de troubles qui peuvent être apportés de la part des tiers à la jouissance du conducteur ; il y en a qui ne consistent que dans des voies de faits, sans que ceux qui ont apporté le trouble prétendent avoir aucun droit dans l'héritage, ou par rapport à l'héritage. Par exemple, si des laboureurs voisins font paître leurs troupeaux dans les prairies d'une métairie que je tiens à ferme, et ce, par voie de fait, sans prétendre en avoir le droit ; si des voleurs, au clair de la lune, endommagent mes vignes, etc., le locateur n'est pas garant de cette espèce de trouble, le fermier n'a d'action que contre ceux qui

“ Pont causé — *actionem injuriarum* — et si cette action lui
 “ est inutile soit parce qu’on ne connaît pas ceux qui lui
 “ ont causé le tort, soit par leur insolvabilité, et qu’il ait,
 “ par ce moyen été privé de tous les fruits qu’il avait à
 “ recueillir ou de la plus grande partie, le fermier peut
 “ seulement en ce cas demander la remise de la ferme,
 “ pour le tout ou pour partie, ” etc., et au No. 287.

Par cette article l’on voit que si le locataire avait aucun droit contre son locateur pour avoir été privé de la jouissance de la maison louée, il aurait contre son locateur, non pas une action en dommage (*actionem injuriarum*) comme il a jugé à propos de prendre, mais bien une action en demande de remise de loyer, et cette dernière seulement dans le cas où celui qui a apporté le trouble serait inconnu, ou que par son insolvabilité ou autres raisons il ne pourrait faire valoir ses droits contre celui-ci.

Le même principe est établi au No. 287 du même traité de Pothier où il est dit que “ si un étranger qui a apporté
 “ du trouble à la jouissance du locataire ou fermier, pré-
 • “ tendant avoir la possession de la pièce de terre dans la
 “ jouissance de laquelle il a troublé le premier, ou y avoir
 “ quelque droit de servitude, ce fermier n’étant pas pos-
 “ sesseur, ne pourra pas lui former complainte : il n’aura
 “ en ce cas que l’action personnelle contre son locateur
 “ pour qu’il soit tenu de le faire jouir sans trouble, etc. ”

“ Si l’étranger qui a apporté du trouble ne prétend avoir
 “ ni la possession, ni aucun droit dans l’héritage, le ter-
 “ mier a de son chef action contre lui, *actionem injuriarum*,
 “ aux fins de défenses et de dommages et intérêts, s’il a
 “ souffert quelque préjudice. ”

Pour ces raisons, et d’après les autorités que je viens de citer, je suis d’opinion que l’action devrait être renvoyée.

Jugement :—Action renvoyée avec dépens.

RHÉAUME, pour le demandeur.

JOLICŒUR, pour le défendeur.

QUEEN'S BENCH, } DISTRICT OF MONTREAL
 APPEAL SIDE.

Before :—DUVAL, Chief-Justice, MEREDITH, MONDELET
 and BADGLEY, Justices.

COLVILLE, *et al.*, *Appellants*,
 and
 FLANAGAN, *Respondent*.

In an action against executors, it appeared that the deceased, on the 4th September, 1880, being then on his death bed, and having made his will in March previous, stated to his secretary, amongst other things, that he was a dying man, and requested him to write certain Bank checks, payable to certain persons named; to whom he wished to give a token of his regard, and then signed the checks so written, which checks remained in the possession of the secretary until after his death.

On the 6th September, in presence of members of his family, and of certain of his friends, the deceased assented to the checks, when the names and amounts were read over to him at his request, and died the following day.

An action was brought by the plaintiff, an episcopal clergyman in the parish where the deceased resided, to recover the amount of one of the said checks, made in his favor for \$1000, which had been presented at the Bank where it was made payable, and had been protested for non payment.

The defendants pleaded that the will of the deceased under which they were named executors, had never been revoked or altered; that there was no value or consideration for the check; and that at the date of the same, the deceased was laboring under disease of the brain, and was not of sound and disposing mind, but was incapable of contracting or disposing by last will :

Held, in the Superior Court :—1o. That at the time of the making of the said checks, and subsequently, the deceased was in a sound rational state of mind and understanding.

2o. That the plaintiff was entitled to recover as upon a *don manuel*, the delivery of the check to the secretary being, under all the circumstances, held to be an actual and immediate delivery, *tradition*, of the gift.

In the Court of Appeal :—1o. As above in respect to the mental capacity of the deceased.

Dans une action contre des exécuteurs testamentaires, il apparaissait que le défunt, le 4 septembre, 1880, étant alors sur son lit de mort, et ayant fait son testament dans le mois de mars auparavant, entra autres choses, dit à son secrétaire, qu'il se mourait, et le requit de remplir certains *checks* payables à certaines personnes auxquelles il désirait marquer son amitié, lesquels *checks* il signa et remit à son secrétaire pour les garder jusqu'après son décès.

Le 6 septembre, en présence des membres de sa famille, et de certains de ses amis, le défunt confirma ces *checks* quand les noms et les montants lui furent lus à sa réquisition, et il mourut le jour ensuivant.

Une action fut portée par le demandeur, un ministre de l'église épiscopale, dans la paroisse où le défunt résidait, pour le recouvrement du montant d'un de ces *checks*, fait en sa faveur pour \$1000, qui avait été présenté à la banque où il était payable, et avait été protesté faute de paiement.

Les défendeurs plaidèrent que le testament du défunt, par lequel ils étaient nommés exécuteurs, n'avait jamais été révoqué ou changé; que le *check* n'était pas causé pour valeur ou considération; et qu'à la date d'icelui, le défunt souffrait d'une maladie du cerveau, et n'était pas sain d'esprit, mais était incapable de contracter ou de faire aucune disposition testamentaire :

Jugé, en Cour Supérieure :—1o. Qu'à l'époque où les dits *checks* furent faits, et subséquemment, le défunt était sain d'esprit et d'entendement.

2o. Que le demandeur était en droit de recouvrer, comme pour un *don manuel*, la livraison du *check* au secrétaire étant, dans les circonstances, jugée être une *tradition* actuelle et immédiate du don.

Dans la Cour d'Appel :—1o. Comme ci-dessus dit sous le rapport de la capacité mentale du défunt.

<p>20. That the plaintiff was not entitled to recover as upon a <i>don manuel</i>, but that the check was valid and effectual as a testamentary bequest or disposition.</p>	<p>20. Que le demandeur n'avait pas droit de recouvrer comme pour un <i>don manuel</i>, mais que le check était valide et bon comme legs ou disposition testamentaire.</p>
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Judgment rendered 1st March, 1863.

The judgment appealed from in this cause was rendered, in the Superior Court, Montreal, on the 26th September, 1862, (MONK, Justice,) and condemned the appellants, as executors of the last will of the late Sir George Simpson, governor in chief of the Hudson Bay Company's territories, to pay to the respondent the sum of \$1000, currency, claimed to have been given or bequeathed to him by Sir George Simpson.

The declaration consisted of four counts containing allegations to the following effect.

First count :

"That heretofore, to wit, on the 4th day of September, 1860, at Lachine aforesaid, the said late Sir George Simpson declared it to be his desire to give and bestow to and upon the plaintiff the sum of \$1000; and then and there, in pursuance of his said expressed desire and intention, he drew and signed his certain check in writing, bearing date at Lachine aforesaid, the said fourth of September, 1860, upon the Bank of Montreal, (to wit, at Montreal) whereby he directed the cashier of the said Bank to pay to the Reverend John Flanagan, or order, (to wit, the plaintiff or his order) one thousand dollars, and then and there, by manual delivery, *donation manuelle*, handed and delivered the said check to Edward M. Hopkins, of Lachine aforesaid, esquire, entrusting to him the said check for delivery to the said plaintiff, the said Edward M. Hopkins then and there acting for and representing the plaintiff, and who accepted the same on behalf of the said plaintiff, and hath since deli-

“ vered the same to the plaintiff, which check is herewith
 “ filed to form part hereof. ”

That the check was duly presented and payment refused,
 and was duly protested.

“ That the amount of said check was, before the death
 “ of the late Sir George Simpson, and on or about the date
 “ of said check, entered in the private account books of
 “ the said late Sir George Simpson, as having been paid
 “ to the said plaintiff, and was charged to and taken out
 “ of the estate of the said late Sir George Simpson, before
 “ his death ; and that, moreover, the said sum was not, and
 “ is not, included in the inventory of the estate and suc-
 “ cession of the said late Sir George Simpson, taken upon
 “ the fourth day of December, 1860, and which inventory,
 “ specifying the cash balance of the said late Sir George
 “ Simpson at the time of his death, the amount of the said
 “ check being deducted, hath not hitherto been questioned
 “ by the defendants. ”

The death of Sir Gorge Simpson, 7th September, 1860,
 leaving defendants as executors, and that the amount “ so
 granted and given ” was due and owing to the plaintiff.

The second count reiterates the allegations as to the *don
 manuel*, and then alleges :

“ That on the 6th September, 1860, at Lachine aforesaid,
 “ the said Sir George Simpson being still of sound memory
 “ and understanding, and being desirous of ratifying and
 “ confirming the said gifts, and more especially the gift to
 “ the plaintiff, requested the said Edward M. Hopkins to
 “ write down the names of those to whom he had made the
 “ said gifts as aforesaid, and in whose favor he had drawn
 “ the checks as aforesaid, and the amount of each said
 “ checks,” and that the same were so written down by
 “ Mr. Hopkins, who “ immediately in the presence of nu-
 “ merous witnesses read over the same to Sir George
 “ Simpson, who then and there confirmed and reiterated each

" gift, and declared the same to be in accordance with his
" last wishes. (1)

The allegations as to the presentment and protest of
check, the death of Sir George Simpson, and the quality
of the defendants, are also repeated in this count.

The third count set up: " That on the 10th March, 1860,
" Sir George Simpson made his last will in writing before
" witnesses, of which probate was duly granted on the
" 6th November, 1860.

" That on the fourth day of September, 1860, Sir George
" Simpson being then ill of body and in the near prospect
" of death, but of sound and disposing mind, memory and
" understanding, declared it to be his desire, *to give and*
" *bequeath* to certain persons, his friends, whom he then
" and there named, certain other sums of money by him
" specified, and among others, to the plaintiff, the sum of
" \$1,000; and then and there, in pursuance of his said
" expressed desire and intention, he drew and signed his
" certain other check in writing, bearing date," &c.

" That on the 6th September, 1860, Sir George Simpson
" being then ill of his last illness at his usual residence, in

(1) Memoranda at the request of Sir George Simpson, on the 6th September, 1860 :

Angus Cameron.....	\$5000	} For each of these amounts I was in- structed to draw checks on the 6th Sep- tember, which were signed by Sir George Simpson in the presence of myself and James Murray.
Hector M'Kenzie.....	5000	
R. M. Hopkins.....	5000	
Rev. J. Flanagan.....	1000	
Rev. W. Simpson.....	1000	
James Murray.....	1200	

The above was written and read over by me, and approved by Sir George Simpson
in the presence of all his family.

(Signed) EDWD. M. HOPKINS.

The above memoranda were taken in the presence of the undersigned, at the
request of Sir George Simpson.

(Signed) A. CAMERON. FRANCES WEBSTER CAMERON.
JAMES MURRAY. MARGARET MCKENZIE SIMPSON.

Lachine, 6th September, 1860.

[Copy of Check.]

BANK OF MONTREAL,
Lachine, 4th September, 1860.

Pay to the Rev. John Flanagan one thousand dollars.

(Signed) G. SIMPSON.

To the Cashier.

“the village of Lachine, and being desirous of making certain bequests to his friends, and amongst others to the plaintiff in accordance to his previous intention,” requested Mr. Hopkins to write down the said bequests.

“That the said memorandum of the said bequests was then and there in the presence of more than three witnesses, and some of them were then and there called upon, by the said late Sir George Simpson, to attest the same, and bear witness, that such was his last will, and words to that effect, read over by the said Edward M. Hopkins to the said late Sir George Simpson, who approved and confirmed each item and bequest, separately, and declared the same to be in accordance with his last will, and to be his last will.

“That the substance of the testimony of the witnesses attesting the speaking, declaring and publishing of such testamentary words was put into writing, within six days from the speaking, declaring and publishing of such words, and that proof of the speaking, declaring and publishing thereof hath been duly made, and probate of such bequest, and of the memorandum of the same, hath been granted by the honorable James Smith, J. S. C., upon the eleventh day of October instant.

“That at the time of making the said bequests, the said Sir George Simpson was in full possession of his mental faculties, and of sound and disposing mind, memory and understanding.”

“That the plaintiff is the Reverend J. Flanagan, mentioned in the said memorandum of bequests, hereinbefore recited.”

The fourth count set up the bequest of the 6th September, 1860, as having been made as a *codicil in writing* to the last will of the testator, of the 10th March, 1860, and that probate of such codicil was duly granted.

The defendants, by their plea, admitted the making of

the will of the 10th March, 1860, but denied that the will had been revoked or altered in any way ; and alleged that the defendants were ignorant as to the making of the check in question, which is moreover alleged to have been made without any value or consideration given, adding :

“ That on the said 4th September, 1860, the said Sir George Simpson was labouring under disease of the brain, with which he had been some time previously attacked, and of which he died on the 7th September, 1860.

“ That the said Sir George Simpson was not, on the 4th September, 1860, of sound and disposing mind, memory and understanding, as is pretended and alleged in the said declaration, but, on the contrary, was throughout the whole day, and for some time previously had been, and from that day until his decease continued to be, of unsound mind, memory and understanding, and wholly incapable in law of contracting or disposing by last will and testament or otherwise.”

The plea also contained a general denial of all the allegations in the declaration not expressly admitted by the plea.

The parties proceeded to proof and the judgment rendered in the Superior Court was in the following terms :

“ The Court, having heard the parties by their Counsel upon the merits of this cause, and upon the motion of the defendants of the twenty-third of May last, that the depositions of the following witnesses examined by the said plaintiff, to wit : Hector McKenzie, James Murray, Edward M. Hopkins, the Rev. William Simpson, Angus Cameron, and Frances Webster Simpson, be rejected from the record of proceedings in this cause, and the evidence therein contained held for naught, having examined the proceedings, and proof of record, and having duly deliberated, doth reject the said motion of the said defendants, and consider-

ing that it is not alleged, pretended, or proved by the defendants that there was any fraud or suggestion practised in regard to the gift or donation mentioned and set forth in the plaintiff's declaration, or any improper influence whatever exercised over the mind of the late Sir George Simpson relative to the said gift or donation, the amount whereof is sought to be recovered by the present action ; and considering that the defendants have not proved by legal and conclusive evidence that the said late Sir George Simpson, at the time of making and signing the order or check by the plaintiff produced and filed in this cause, and at the time of making the gift or donation set forth in the plaintiff's declaration, was of unsound mind and incapable in law of making such gift or donation ; considering, on the contrary, that the plaintiff hath established by legal and sufficient testimony that at the time and times of making and signing such order or check, and of making such gift or donation, to wit, on the fourth and sixth days of September, 1860, the said late Sir George Simpson, though sick with his last illness, was of sound mind and capable in law of making such gift or donation ; seeing, moreover, that in the act itself of making such gift or donation there does not appear to this Court anything unreasonable, irrational, or indicative of unsoundness of mind on the part of the said late Sir George Simpson ; and inasmuch, therefore, as the defendants, in their said qualities and capacities, have failed to establish by legal and sufficient testimony the material averments of their plea firstly pleaded in this cause, doth overrule, reject and dismiss the said plea ; and the Court proceeding to adjudge upon the merits of the plaintiff's action and *demande*, considering that the plaintiff hath established by legal and sufficient evidence the material allegations of his declaration, and particularly that the order or check dated 4th September, 1860, and upon which the present action rests in part, was drawn and made payable to the order of the said plaintiff, at the request and by the order and direction of the said late Sir George Simpson, vo-

luntarily and without any fraud, suggestion, or improper influence on the part of the said plaintiff, or on the part of any person or persons whomsoever, and was in like manner duly signed and delivered to E. M. Hopkins, his private secretary, with precise and strict directions to him, the said E. M. Hopkins, to deliver the same to the said plaintiff for his sole benefit and behoof; and considering that it is clearly apparent from the evidence of record, and in an especial manner by the memorandum of the 6th September, 1860, made and prepared by order of the said Sir George Simpson, and by him fully sanctioned and approved, that it was the will and intention of the said late Sir George Simpson thereby to make a gift or donation of the amount or sum of money in the said order or check, and in the said memorandum specified, to the said plaintiff, as a token of his remembrance, and of his friendship and regard for the said plaintiff, and in requital of past friendly acts; considering that although the medical testimony adduced in this cause is conflicting, and not entirely conclusive in establishing the state of the late Sir George Simpson's mind during the period of his last illness, yet that it clearly results from the whole of the evidence adduced that during the 4th, 5th and 6th days of September, 1860, the said late Sir George Simpson enjoyed several intervals of reason, and was at different times on those days in a rational and sound condition of mind. And seeing that it is proved that at the time and times of making and signing the order and check above mentioned, and of manifesting the intention aforesaid, not only verbally, but by the memorandum aforesaid, the said Sir George Simpson was restored to and shewed lucid intervals of reason, and exhibited a sound and rational state of mind. Considering that in the opinion of this Court there is no rule or principle of law fixing a duration of a lucid interval or the intermission of delusion, hallucination or insanity, in order that acts done in those intervals or intermissions should be valid in law; and considering, therefore, that at the time and times

of making and signing the order or check aforesaid, and of making the gift or donation aforesaid, as manifested by said check, and by the said memorandum of the 6th of September, 1860, the said late Sir George Simpson was capable in law of making such gift or donation; considering also that from the act itself no indication of frenzy, folly, or mental incapacity on the part of the late Sir George Simpson arises or can be inferred, but, on the contrary, the gift or donation is not excessive in amount, considering the fortune left by the late Sir George Simpson, or unreasonable when the position of the plaintiff and his friendly relations with the deceased are borne in mind; seeing, moreover, that from the manner of performing the act in question, insanity or an otherwise irrational state of mind cannot be presumed, but the reverse; and considering that the delivery of the said order or check of the 4th of September, 1860, by the said late Sir George Simpson to the said E. M. Hopkins, under all the circumstances proved in this case relative thereto, was by law and the jurisprudence of this country equivalent to actual and immediate delivery, *tradition réelle*, to the said plaintiff; seeing that the making, signing and delivery of the said order or check and the reiterated intentions of the said Sir George Simpson relative thereto, both written and verbal, in the manner and under the circumstances proved in this case, constituted and was in law a gift or donation, *don manuel inter vivos*, of the sum of money therein specified by the late Sir George Simpson to the said plaintiff, as alleged in his declaration; considering that inasmuch as by the order or check aforesaid, and the memorandum of the 6th September, 1860, produced in this cause, the said plaintiff became, and was, and is entitled as the donee of the late Sir George Simpson to have and receive from the said defendants in their said qualities and capacities the sum of money claimed by the present action, it follows that by the actual delivery afterwards of the said order or check by E. M. Hopkins to the plaintiff, the said plaintiff was entitled to receive the

amount of said check or order upon presenting the same for payment thereof; considering that by the decease of the said late Sir George Simpson previous to the presentment of the said order or check for payment, the said gift or donation did not by law lapse or fail, nor could the payment of the said order or check be legally refused, the order or *mandat* therein contained not being extinguished by the death of Sir George Simpson, but, under the circumstances of this case, continued thereafter to be and is now in full force and effect; seeing that the said gift or donation is undisputed by any creditor of the late Sir George Simpson, but is questioned and disputed by the defendants only, the executors of his last will and testament; considering, therefore, that the amount and sum of money granted as aforesaid, and mentioned in the said order or check of the fourth September, one thousand eight hundred and sixty, and in the said memorandum of the sixth September, one thousand eight hundred and sixty, constituted and is in law a legal and valid claim now against and upon the estate and succession of the said late Sir George Simpson, and is recoverable from the said defendants in their qualities and capacities by them admitted of executors of the last will and testament of the said late Sir George Simpson. Doth maintain the plaintiff's action, and doth adjudge and condemn the defendants, in their said qualities and capacities, to pay and satisfy to the plaintiff the sum of two hundred and fifty pounds, one thousand dollars, current money of the Province of Canada, being the amount of the said gift or donation, *don manuel*, with interest thereon from the fourteenth day of October, one thousand eight hundred and sixty-one, date of service of process, till paid, and costs of suit. ”

The points and authorities referred to by the counsel in appeal were in effect the following :

On behalf of the appellant :

1. The *check* is sued on as a *don manuel inter vivos*. and

the portion of the judgment having reference to the check characterizes it as such.

To render such a donation valid, there must be, says Bourjon (tom. 2, tit. 4, ch. 1, s. 1, Nos. 1, 3, 4.) “*Dépouillement effectif, irrévocable,*” — “*ce dépouillement n'est pas une simple forme, mais l'essence même de la donation, et sa base.*” And, in speaking of the distinctive character of a donation *inter vivos*, he says, it ought to be quite clear, “*que le donataire a préféré le donataire à lui-même et non seulement à son héritier.*”

The rule on this point is thus laid down in the Nouveau Denisart, *verbo* Don. entre vifs, § vii, No. 5, pages 40 and 41, — “*la tradition requise pour la validité des donations entre vifs, est une tradition parfaite et consommée. Il faut que celui qui donne cesse de posséder ; que celui auquel on donne, commence à posséder, il ne suffirait pas que celui qui donne, abandonne la propriété de la chose donnée. Par cette abdication, elle peut cesser de lui appartenir ; mais elle n'est pas encore la chose du donataire qui ne s'en est pas mis en possession.*”

Demolombe, *Traité des Donations*, &c., 1 vol., No. 22, pages 21, 22, states the point thus, — “*Le dépouillement actuel et irrévocable du donateur au profit du donataire, tel est le second caractère distinctif et essentiel de la donation entre vifs, c'est-à-dire, qu'il est indispensable, que dès l'instant où la donation entre-vifs s'accomplit, le donateur soit dessaisi de manière à ne pouvoir plus se repentir.*”

Troplong, *Traité des Donations*, &c., vol. 2, No. 1046, p. 411, says, — “*Le don manuel tire sa force de la dépossession actuelle et irrévocable du propriétaire. Ce n'est pas un don manuel que celui où l'on trouve d'autres combinaisons.*”

The respondent contended that no delivery of the check

was made to any one, and Mr. Hopkins received delivery of the check for and as the attorney or *negotiorum gestor* of the respondent.

On the question of delivery to a stranger, as here contended for, the rule is thus stated in the *Nouveau Denisart*, verbo *Don. entre-vifs*, § XII, p. 62, No. 10, — “ Lorsque l'étranger auquel on remet la somme est *père, tuteur, administrateur, ou mandataire du tiers*, au profit duquel la somme doit être employée, il la reçoit pour le donataire, qui en est saisie par son ministère dès le moment de la tradition. *Au contraire*, lorsque l'étranger auquel on remet la somme *n'a aucun de ces titres*, on ne peut pas dire qu'il la reçoive pour le donataire et en son nom. *Il est regardé alors comme le mandataire du donateur.* ”

2. If the check can be regarded as a donation at all, it was one *à cause de mort*, and is therefore null and void.

The check was signed during Sir George Simpson's last illness, and comes therefore clearly within the provisions of the 277th article of the Custom of Paris, — “ Toutes donations, *encore qu'elles soient conçues entre-vifs*, faites par personnes gisant au lit, *malades de la maladie dont elles décèdent*, sont réputées faites *à cause de mort*, et testamentaires, *et non entre-vifs.* ” Besides, Mr. Hopkins distinctly states that it was intended as a *parting* gift, and that he locked it up with the other checks, in order that should Sir George recover, there might be no record for him to see how ill he had been.

Under all systems of law at any time prevailing in the *pays coutumier* in France, donations *à cause de mort* were utterly null and void. (1)

(1) Bourjon, vol 2, tit. 4, ch. 2, Nos. 1 and 4 :—Ricard, *Traité des Donations*, vol. 1, part 1, ch. 2, Nos. 43–63, et seq. to 82, and note (g) to No. 81 :—Nouv. *Denisart*, verbo *Donations*, § 2, pages 6 and 7. Verbo *Donation à cause de mort*, § 1, pages 13, 14, § 111, pages 17, 18, Nos. 8, 9, pages 20, 21. Verbo *Donations entre-vifs*, § 3, Nos. 4, 5, 6, pages 25 and 26, § 7, Nos. 2, 3, 5, pages 40 and 41, § 12, No. 6, page 60 :—Demolombe, *Traité des Donations*, vol. 1, Nos. 35, 36, 37, 38, and 39 :—Troplong, *Traité des Donations*, No. 1053 :—Arrêt de la Cour de Cas., 4th May 1816 :—*Jour. des An.* 1817, pt. 2, p. 9.

3. It is contended by the respondent that the check is a will.

The case mainly relied on is that of Bartholomew *et al.*, vs. Henley, 3 Phil., p. 317, but there the testator, in the margin of his check book, distinctly declared that he intended the checks to be bequests, and the checks and records in the book were all proved together.

Without however discussing whether a check might or might not have been proved as a will, under particular circumstances in the Ecclesiastical Courts in England before the passing of the 1st Vict., ch. 26, it is enough to say here, that the check, as soon as it got into the respondent's possession, was treated by him as an ordinary check and protested by him for non payment. Moreover, the present action is brought on the check, as a *donation manuelle inter vivos*, and in no way as a will, and no attempt was ever made to prove it as a will. No action can be brought on a will of personalty without probate. (1)

4. The memorandum of the 6th September, 1860, is claimed by the respondent to be a *written* will or codicil.

In the respondent's declaration it is alleged to be a codicil to the written will of the 10th of March, 1860, made by *word of mouth*, and according to one count of the declaration, "at the request of the said Sir George Simpson, "committed to writing by Edward M. Hopkins, of Lachine, "Esquire, in the presence of the said testator and of numerous witnesses, and immediately thereafter read over "to the said testator, and approved, and confirmed by "him," and (according to another count of the declaration) "put into writing, within six days from the *speaking*, "declaring and publishing of such words."

If this memorandum be a testamentary paper at all, it is

(1) Williams, on Executors, vol. 1, page 239, (Eng. paging, 4th ed.) :—I Jarman on Wills, page 211,

clearly nothing more than a *nuncupative will*, reduced to writing, and therefore falls within the provisions of the statute of frauds. (1)

Now by that statute it is distinctly enacted, that no such will "shall be good, that is not *proved* by the oaths of *three* witnesses (at the least) that were *present* at the making thereof; nor, unless it be *proved*, that the testator, at the time of *pronouncing* the same, did *bid the persons present*, or some of them, *to bear witness* that such was his will." And that no such will shall have the effect of repealing, or altering, or changing any clause in a "will in writing concerning any goods or chattels, or personal estate, except the same be in the lifetime of the testator committed to writing, and, after the writing thereof, read over to the testator, and allowed by him, and *proved to be so done by three witnesses at the least.*"

It is submitted, 1st, that such witnesses must be disinterested, and that the legatees are wholly incompetent. (2)

2nd. That the testator must be proved to have *pronounced* the will; and 3rdly., that it must be *proved* that he *bid* the persons present to *bear witness* to his will thus pronounced. (3)

A nuncupative will, when *all* the formalities of the statute of frauds are complied with, may possibly become or be considered a *written* will, but, to make it so, all the statute requires as to proof *must be strictly* attended to.

As to the character of the witnesses, they must be such as at the time of the passing of the statute of Anne, (4 and 5 Anne, ch. 16, s. 4,) would have been "good witnesses on trials at law." The respondent contends that the

(1) 29 Car. 2, ch. 4, s. 19, 21 and 22.)

(2) Vide 1 Jarman on Wills, p. 63 (English ed.); and 104, 105, (Am. ed.) :—Love-
laas on Wills, p. 161, (Am. ed.), and 301, (English ed.) :—Swinburne on Wills, p.
347 :—Williams on Executors, 1 vol., page 278, (Eng. paging, 4th ed.)

(3) Vide Statute of Frauds, *loco citato* :—Love-
laas on Wills, pp. 181, 182, (Am.
ed.), 339, 340, (Eng. ed.) :—1 Jarman on Wills, pp. 130, 131, and notes (Am. ed.),
89 and 90, (Eng. ed.) :—2 Blackstone's Com., p. 501, old paging :—Williams on
Executors, vol. 1, pages 99, 100, 101, (Eng. paging, 4th ed.)

statute 25 Geo. 2nd, ch. 6, so interfered with the statute of Anne as to render legatees competent witnesses to prove a will or codicil, by annulling their legacies, but the statute relied on is evidently confined to wills of *real* property, and has been always so regarded in England. (1)

On behalf of the respondents :

First. That donations made under circumstances such as are disclosed in this case have been recognized as valid. (2)

Second. That under our Law, donations of moveables may be made without writing, and by simple delivery. (3)

Third. That by the French Law, a check is treated as a note payable to bearer, and passess validly from hand to hand. (4)

Fourth. That a check payable to a person named in it, is not revoked by the death of the maker. (5)

English authorities for respondents as to form of will. (6)

As to validity of checks and drafts as wills. (7)

As to effect of probate. (8)

As to the medical testimony. (9)

(1) Lovelace on Wills, p. 302, (English paging, 12th ed.) :—1 Williams on Executors, p. 278, (English paging, 4th ed.) :—2 Williams, p. 907.

(2) 16 Bréard de Neuville, Pandectes de Pothier, p. 209 :—Ib. 6 vol., p. 311 :—2 Journal des Audiences, pp. 343, 351, ch. 59 :—Arrêt du Parlt. de Paris, 16 Déc. 1664 :—Merlin, Quest. de Dr., vbo. Donation, No. 1 :—3 Augeard, p. 135, Arrêt N., 49, No. 12 :—Nouveau Denisart, vbo. Dépôt, sect. 1 :—Danty, Preuve, ch. 3, p. 104, No. 6 :—Merlin, Questions de Dr., vbo. Donation, sect. 6 :—Pothier, Donations, sect. 2, art. 1 :—9 D'Aguesseau, pp. 361, 448, 450 :—Troplong, Dépôt, No. 149, p. 119.

(3) 1 Grenier, Donations, pp. 418, 421, 424, 426.

(4) Pardessus, Droit Com., part 3, tit. 2, ch. 10, No. 457 :—8 Gouget et Mercier, p. 749, vbo. Mandat de Change.

(5) Troplong, Mandat, pp. 661, 718, 737, 738 :—2 Augeard, Arrêts Notables, p. 135 :—Nouveau Denisart, vbo. Donation entre-vifs, sect. 12 :—5 Toullier, No. 172 :—2 Troplong, Donations, Nos. 1047, 1055 :—Troplong, Dépôt, Nos. 146, 159.

(6) Swinburne, pp. 10, 11, 63, 64, 67, 76, 80, 82, 87, 89 :—1 Peere Wms. p. 440 :—2 Chitty's Blackstone, pp. 500, 501 :—2 Phil., Ec. Cases, pp. 213, 177 :—1 do., p. 12 :—Williams, on Executors, pp. 49, 51, 56 :—Jarman on Wills, (Ed. 1849), pp. 11, 12, 19 :—4 Kent, Com., p. 517 :—Petersdorff's Ab., vbo. Wills, pp. 401, 462 :—1. L. C. Jurist, pp. 206, 228.

(7) 3 Phil., p. 317 :—2 Eng. L. and Equity Rep., p. 51 :—14 Jur., p. 675.

(8) 1 Williams, Executors, pp. 339, 340 :—1 Jarman, p. 28 :—Greenleaf on Evidence, 3, sect. 672 :—4 Burns, Ec. Rep., p. 107.

(9) 1 Bell's Commentaries, Book 2, part 2, c. 8, sect. 2.

It is unnecessary to enter into the details of the only question of fact discussed by the judges in rendering their judgment in appeal, namely, as to whether Sir George Simpson was, on the 4th and 6th of September, 1860, in a sound and rational state of mind and competent to make the disposition and do the acts referred to in the proof.

1. This point the Court decided in the affirmative and also held—

2. That the judgment below could not be supported on the ground that there was a *don manuel*, all the judges holding that there was no such gift or donation.

3. That the plaintiff was entitled to recover on the ground that the check was valid as a testamentary bequest of the monies mentioned in it.

Judgment in appeal : — “ Considering that the said late Sir George Simpson, at the time of his making and signing the check, the subject matter of contestation in this cause, in favor of and payable to the said respondent, plaintiff below, for the sum of \$1000, to wit, on the fourth day of September, 1860, and at the time of his, the said late Sir George Simpson’s subsequent acknowledgement and recognition of the said check, to wit, on the 6th day of September, 1860, was of sound mind and understanding : and considering that in the disposition aforesaid by the said Sir George Simpson of the said sum of money in and by the check, the same was a legacy and bequest made by the said Sir George Simpson to and in favor of the said respondent, plaintiff aforesaid : Considering that in the judgment of the Superior Court for Lower Canada, sitting at the city of Montreal, in the district of Montreal, on the 26th day of September, 1862, adjudging and condemning the said appellants, defendants aforesaid, to pay and satisfy to the said respondent, plaintiff aforesaid, the said sum of \$1000, there is no error, doth, for the considerations

aföresaid, affirm the said judgment, with costs to respondent against the said appellants."

BETHUNE, for appellants.

SNOWDON and GAIRDNER, for respondent.

LAFLAMME, R., and TORRANCE, F. W., counsel for respondent.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—DUVAL, MEREDITH, MONDELET et BADGLEY,
Juges.

MONJEAU, *Appelant*,
et

DUBUC, *Intimée*.

Jugé :—Quel acquéreur d'un immeuble, dont une moitié n'était possédée par le vendeur qu'à titre d'usufruit, peut refuser d'en payer le prix, et peut demander la résiliation de la vente, s'il est menacé d'éviction, sans être tenu d'accepter les cautions offertes par le vendeur.

Held :—That the purchaser of an immoveable, one half of which was possessed by the vendor simply à titre d'usufruit, may refuse payment of the price of sale, if he be threatened with eviction, and this without being obliged to accept the sureties offered by the vendor.

Jugement rendu le 1er mars, 1864.

L'appelant, par acte du 4 septembre, 1861, devant notaires, vendit à l'intimée un terrain qu'il déclara lui appartenir pour l'avoir acquis du shérif le 19 octobre, 1858, pour le prix de \$700.00.

Cet immeuble avait été adjugé à l'appelant, le 15 juin, 1858, du vivant de Sophie Daigneau, épouse de l'appelant, avec laquelle il était commun en biens, et qui était ensuite décédée le 7 septembre, avant le jour auquel l'appelant obtint du shérif le titre de l'immeuble qu'il avait ainsi acheté.

Sophie Daigneau par son testament avait donné à l'appe-

lant l'usufruit de ses biens, et la propriété à des neveux et nièces.

Plus tard, l'intimée informée de l'état des choses, signifia à l'appelant qu'appréhendant d'être troublée par les légataires à la propriété, elle n'entendait pas donner suite au contrat, et lui déclara son intention de résilier la vente.

L'appelant lui offrit alors une caution qui s'obligerait avec hypothèque spéciale au montant de \$800; l'appelant offrant en sus d'hypothéquer un autre immeuble à lui appartenant, jusqu'au montant de \$500. L'intimée ne fut pas satisfaite des cautions offertes, et l'appelant porta son action pour le recouvrement du prix, alléguant dans sa demande, et le protêt de l'intimée, et les offres de cautionnement qu'il avait faites.

Par ses défenses l'intimée alléguait le dol de l'appelant, et la déception à laquelle elle fut soumise par les représentations de l'appelant en se donnant comme véritable propriétaire de l'immeuble; l'insuffisance des cautionnements offerts, et son droit de demander la résiliation; elle établissait que l'immeuble en question était un conquêt de la communauté entre l'appelant et la dite Sophie Daigneau, et que l'appelant n'était propriétaire que pour moitié, n'ayant l'autre moitié qu'à titre d'usufruit, et non de substitution, en vertu du testament de la dite Sophie Daigneau. Elle offrait de plus et consigna le montant réclamé, et les intérêts de deux ans aux conditions suivantes: 1o. que le demandeur ferait, sous 15 jours du jugement à intervenir, cesser le trouble en question, et donnerait à la défenderesse cautions solvables, à sa satisfaction; que chacune hypothéquerait des biens fonds francs et quittes de toutes dettes et hypothèques quelconques, et ce jusqu'au montant de 2,000 piastres, et qui s'obligeraient solidairement de faire en sorte que la défenderesse, ses hoirs et ayants cause, ne seraient à l'avenir troublés, inquiétés ou évincés du dit immeuble ainsi par elle acquis du demandeur, ou d'aucune partie d'icelui, soit par les dits neveux et nièces de la dite

feue Sophie Daigneau, leurs hoirs et ayant cause, par les créanciers hypothécaires ou autres, et ce, à peine de tous dépens, dommages ou intérêts que la demanderesse pourrait souffrir pour quelque cause que ce pût être, (y compris le remboursement du dit prix de vente, en capital et intérêts échus et à échoir) par rapport à la vente en question, et à défaut par le demandeur de ce faire dans le délai susdit, elle concluait à ce qu'il fût forclos de ce faire, et qu'alors et dans ce cas, l'acte de vente ainsi fait par le demandeur à la défenderesse, le 4 septembre, 1861, fût déclaré illégal, nul et de nul effet, et comme non avenu entre les parties en cette cause, et que cet acte fût résolu pour toutes fins que de droit, et en conséquence la défenderesse déchargée de payer au demandeur le dit prix de vente en capital et intérêts échus et à échoir, et que les offres ainsi faites au demandeur par la défenderesse de lui payer la dite somme de 707 piastres, et de plus celle de 12 piastres, pour intérêts depuis le 29 octobre, 1861 au 8 février, 1862, ainsi que la consignation d'icelles devant cette Cour, fussent déclarées comme non faites, nulles et de nul effet, et comme non avenues, et que la défenderesse avait droit de retirer ce dépôt, et enfin l'action du demandeur renvoyée avec dépens, et dans tous les cas, la défenderesse concluait au débonté de cette action quant au surplus de la dite somme ainsi consignée.

Ces défenses furent produites le 8 février, 1862, et le dépôt de 719 piastres aussi fait ce jour-là.

Le 18 février 1863, la Cour Supérieure à Montréal rendit le jugement qui suit : (M. le juge assistant Monk siégeant)

“ La Cour, &c. Considérant qu'il résulte de la preuve produite dans cette cause, que le 15 juillet, 1858, le demandeur est devenu adjudicataire et propriétaire en vertu d'une vente par le shérif du district de Montréal de l'immeuble décrit en la déclaration du demandeur, et par lui vendu à la défenderesse, par acte de vente en date du 4 septembre, 1861 ; considérant qu'il est établi qu'an

temps de la dite vente et adjudication par le shérif, il existait communauté de biens entre le demandeur et son épouse, feue Sophie Daigneau, alors vivante, partant que le dit immeuble est tombé dans la dite communauté de biens, et en est devenu un conquêt immeuble ; considérant d'abondant, qu'il n'est pas prouvé quand et à quelle époque le dit demandeur a payé au shérif le prix de vente du dit immeuble ; considérant qu'au temps du décès de la dite Sophie Daigneau, ci-après mentionné, la moitié *indivise* du dit immeuble appartenait à la dite Sophie Daigneau, et l'autre moitié indivise au dit demandeur : Considérant que par son testament solennel reçu devant Mtes. E. Pages, notaire public, et témoins, en date du deux septembre, mil huit cent cinquante-huit, la dite Sophie Daigneau, alors épouse du dit demandeur, entr'autres legs, a légué au demandeur, son époux, l'usufruit de ses immeubles, et entr'autres de la moitié indivise de l'immeuble en question, sa vie durant, et la propriété de ses dits immeubles à ses neveux et ses nièces en la manière et tel que pourvu dans son dit testament ; vu que la dite Sophie Daigneau est décédée le sept septembre, mil huit cent cinquante-huit, sans avoir révoqué ou changé son dit testament, et que comme commune en biens avec le demandeur, son époux, elle était à l'époque de son décès, propriétaire comme susdit de la moitié indivise de l'immeuble en question dans cette cause.

Considérant qu'au temps de la vente de l'immeuble en question, le quatre septembre, mil huit cent soixante-et-un, le demandeur n'était propriétaire que de la moitié indivise du dit immeuble, et que de l'autre moitié indivise il n'était que l'usufruitier, en vertu du testament de la dite Sophie Daigneau, sa défunte épouse.

Considérant qu'au temps de la vente en dernier lieu mentionnée, le demandeur n'avait aucun droit de vendre la dite moitié indivise de l'immeuble dont il avait seulement la jouissance sa vie durant comme usufruitier : Considérant que d'après nos lois et la preuve produite en cette cause, la

dite vente du quatre septembre, mil huit cent soixante-et-un, est nulle quant à la dite moitié indivise de l'immeuble en question.

Vu le refus de la défenderesse d'accepter la dite vente du quatre septembre, mil huit cent soixante-et-un, pour l'autre moitié indivise du dit immeuble appartenant au demandeur, sans avoir la totalité de l'immeuble ainsi vendu par le demandeur et par elle acheté ; lequel refus, vu la preuve produite en cette cause, est légal et pleinement justifiable, et aussi la requisition et la demande par elle faite au demandeur en date du sept octobre, mil huit cent soixante-et-un, de résilier le dit acte de vente du quatre septembre, mil huit cent soixante-et-un, déclare la dite vente du quatre septembre, mil huit cent soixante-et-un, nulle et comme non avenue entre les parties.

Considérant qu'il appert par la preuve produite en cette cause que les légataires universels en propriété des immeubles délaissés par la dite Sophie Daigneau, ou plusieurs d'entre eux, ont formellement signifié, tant au demandeur qu'à la défenderesse, leur intention de faire déclarer quant à eux la nullité de la dite vente du quatre septembre, mil huit cent soixante-et-un ; aussi de se mettre en possession de leurs parts respectives du dit immeuble au désir du testament de la dite Sophie Daigneau, et qu'ils feront tous autres procédés qu'ils jugeront nécessaires, aux fins susdites : Considérant que dans les circonstances telles que ci-dessus exposées et relatées, le demandeur n'est pas fondé en droit de réclamer de la défenderesse aucune partie du prix de vente comme il l'a fait par la présente demande, en offrant caution que la dite défenderesse ne sera jamais troublée ni inquiétée en la possession, jouissance et propriété du dit immeuble, maintient l'exception ou fin de non recevoir en premier lieu plaidée par la défenderesse, annule le dit acte de vente du quatre septembre, mil huit cent soixante-et-un, à toutes fins que de droit, en sa totalité, tant pour la moitié indivise du demandeur que pour la moitié

indivise du dit immeuble, afférante aux dits légataires universels en propriété de la dite Sophie Daigneau, et a débouté et déboute l'action du demandeur, avec dépens.

De ce jugement il fut interjeté appel, l'appelant soutenant que l'intimée n'avait pas droit de demander la résiliation, mais seulement cautions, et que les cautions qu'il avait offertes étaient suffisantes (1).

DUVAL, Justice :—The plaintiff brought his action for a *prix de vente* ; the defendant pleaded that the plaintiff, at the time of the sale, was only owner of one half of the property sold, the other half belonging to the community between the vendor and his late wife. The question at issue is whether the purchaser can, before eviction, raise this question, and refuse to pay the balance of the *prix de vente*, whilst he is in possession. Pothier in his *Traité de Vente*, speaks of the sale as transmitting rather the possession than the property of the thing sold ; although in his *Traité de Louage*, he does not say the same thing, but the reverse.

We find in 3 Champ. and Rig., p. 1741, an epitome of the old law on the point. (2)

It is clear in this case that the vendor knew, at the time of the sale, that he was proprietor only of one half of the property sold. I consider this decisive of the case. The vendor who sells knowing he is not proprietor, may be met with a plea such as has been filed in this cause. (3)

(1) Autorités citées par l'appelant :
2 Henrys, liv. 4, c. 6, pp. 317, 318 :—2 Catelan, liv. 5, c. 42, pp. 301-2 :—Pothier, Vente, art. 4, No. 48, pp. 478 et suivantes :—14 Toullier, No. 239 :—Troplong, Vente, No. 250 et suiv.

Autorités citées par l'intimée :
Nouv. Den., vbo. Adjudication, p. 233, § 32, No. 5 :—9 Décisions des Tribunaux, p. 385, Loranger vs. Boudreau :—5 Cochin, p. 656 :—Pothier, Vente, Nos. 7, 48 :—Troplong, Vente, pp. 1 à 4, et 12, 13 :—1 Bourjon, p. 413 :—Code Civ., art. 1599 :—Code de la Louisiane, 2427 :—Troplong, Vente, Nos. 230-1-6 :—6 Marcadé, p. 208 :—

(2) Pothier, Vente, Nos. 154, 239 :—1 Berthelot, Evictions, p. 473.

(3) Pothier, Vente, Nos. 154, 239, to which a great number of authorities might be added, tracing the doctrine to the Roman Law.

The property has been paid for after the dissolution of community, therefore the plaintiff pretended it was a *propre*, but the Court will look to the date of the contract to determine whether or not the property fell into the community, and for my part I am satisfied that the property in question did belong to the community.

It may be added that according to the forms most frequently used by notaries here, it was the *fonds* itself that was conveyed, and not merely the possession. Both Marcadé and Troplong hold that this form of deed may be validly adopted. There is nothing *contra bonos mores* in a stipulation that the property itself shall be transferred to the purchaser.

But at all events, without basing the judgment upon this, the Court here holds that in this case the knowledge of the vendor that he was not proprietor is conclusive against him. He cannot collect the full price whilst only selling half the property, selling it knowingly for the whole.

MONDELET, Juge :—Le jugement dont est appel est, à mon avis, aussi exact qu'il est bien clairement motivé.

L'immeuble que l'appelant a, le 4 septembre, 1861, vendu à la défenderesse, était, lors de son acquisition par l'appelant, du shérif, M. Boston, le 19 octobre, 1858, (comme le déclare l'appelant lui-même) tombé dans la communauté alors existant entre lui et Sophie Daigneau, son épouse, qui vivait alors.

L'appelant n'avait dans ce conquêt de communauté, par conséquent, qu'une moitié.

Or, par le testament de sa femme, il n'est qu'usufruitier et non le propriétaire de la moitié de cette dernière. N'ayant donc aucun droit de vendre tout l'immeuble, et l'ayant fait, sachant qu'il vendait une moitié dont il n'était aucunement propriétaire, il n'a aucun droit d'en réclamer le prix. Au contraire, la défenderesse qui est bien fondée

à ne pas accepter la moitié de cet immeuble, et qui a dûment interpellé le demandeur de lui livrer le tout, au lieu de partie de l'héritage, demande, avec raison, que la vente soit déclarée nulle.

Il est incertain *quand* l'appellant a payé au shérif le prix d'adjudication, et cela aussi *incertain* qu'il est établi qu'il a acquis le 19 octobre, 1859.

L'action a été bien et dûment déboutée, et je ne vois aucune difficulté à dire que le jugement dont est appel doit être confirmé.

MEREDITH, Justice :—Our Courts have frequently held (1) that a person purchasing real estate has not a right to have the sale set aside merely on the ground that the vendor was not, at the time of the sale, the owner of the property sold ; but this doctrine, as is plain even from the authorities cited by the appellant, is not applicable to a case where the vendor, knowing that he is not the proprietor of the thing sold, withholds that knowledge from the purchaser. A person purchasing real estate is supposed to have in view the interests of his family ; and no prudent man would wish to leave in his succession, instead of real estate held by a good title, property likely to be the cause of a number of law suits.

In the present case the appellant, it is admitted, is owner of one half only of the real estate which he sold. All the facts which prevented him from having the ownership of the other half of the property, and which caused it to be vested in others were within his knowledge ; and I therefore think that he must in law be presumed to have known that he was selling property not belonging to him. The conduct of the appellant after the sale strengthens this presumption. The sale took place on the 4th September, 1861. Soon afterwards the respondent ascertained that one

(1) Montreal, No. 878, Berthelot vs. Bourne, Oct. 1847 :—1496, Beauregard dit Champagne vs. Joudain, 11th Jany. 1847 :—1032, Sep. 1844, Griffith vs. Vaillant.

half of the real estate purchased belonged to several proprietors ; six of whom duly notified her that they intended to cause her eviction by legal proceedings.

The respondent therefore saw that if the sale were carried out, she would be liable to be made defendant in six petitory actions, which would probably give rise to as many actions *en garantie* ; and therefore very reasonably wished to refrain from carrying out a contract likely to subject her to such consequences.

And yet the appellant instead of offering to desist from the sale when formally notified of the facts above mentioned, has attempted to enforce it by means of the present action, which, under the circumstances, was, I think rightly dismissed.

Jugement confirmé.

ARCHAMBAULT, pour l'appellant.

MOREAU, OUMET et CHAPLEAU, pour l'intimée.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE. }

Before : — DUVAL, MEREDITH, MONDELET and BADGLEY,
Justices.

YOUNG, *et al.*,.....*Appellants*,
and
MULLIN,.....*Respondent*.

In the case of a sale of tea by auction, the conditions of which as announced were cash for purchases under \$100, payment at four months for purchases above that sum, upon giving paper satisfactory to the seller :

Held, in the Court below :—10. That the delay of four months fully ran from the day of the delivery of the whole quantity.

20. That this condition was equivalent to a delay of four months, to be computed from the delivery of the whole quantity.

30. That the offer by the purchaser of a check on the Bank of Toronto, after action brought, but before the expiration of the delay of four months, for the price of the tea, without costs, was sufficient.

Held, in appeal :—That the delay of four months was conditional and could only be invoked upon furnishing to the seller satisfactory paper, which the purchaser had not done before action brought, and that the action, in consequence, ought to be maintained.

Dans le cas d'une vente de thé par encan, dont les conditions annoncées étaient au comptant pour tout achat au-dessous de \$100, et à quatre mois au-dessus de cette somme, en fournissant un effet à la satisfaction du vendeur :

Jugé, en Cour de première instance :—10. Que le délai de quatre mois ne courait que du jour que la quantité entière avait été livrée.

20. Que cette condition équivalait à un délai de quatre mois pour le paiement, à compter de la livraison entière.

30. Que l'offre par l'acheteur d'un check sur la Banque de Toronto, après l'action intentée, mais avant l'expiration du délai de quatre mois, pour le prix du thé, sans frais, était valable.

Jugé, en appel :—Que le délai de quatre mois était conditionnel, et ne pouvait être invoqué qu'en fournissant un effet satisfaisant au vendeur, ce que l'acheteur n'avait pas fait avant l'action intentée, et que l'action, en conséquence, devait être maintenue.

Judgment rendered the 1st March, 1864.

BADGLEY, Justice :—At an auction sale of the appellants' teas, on the 28th May, 1862, conducted by John Leeming, auctioneer, the conditions of sale were as follows :

Of and under \$100, cash on delivery—over \$100, four months, paper satisfactory to the sellers, from this date.

The respondent purchased 91 packages, which were delivered, of which 10 half chests were returned. The established amount of the purchase was \$2,616.72 cts.

An invoice with the terms, 4 months from sale, inserted therein, was duly delivered to the buyer, and he was duly

called upon to fulfil the conditions by giving the stipulated note.

Two *months* after the expiring of the first month, he offered to pay in cash, less a discount of $2\frac{1}{2}$ per cent to 2 per cent, which was declined by the sellers, and simple interest offered by them, which was refused by the purchaser, who both before and after that offer had been willing to give his note, but always for a period prolonging the 4 months 15 to 18 days after the time of *credit* limited. The purchaser claimed the extension of time on account of alleged delay in the delivery of the goods.

The evidence shows that the delivery was finally completed early in June, without precisin^g either the date or the quantities previously delivered, and that the buyer made all sorts of objections, about the quality and weight, which terminated in the return of the 10 half chests, the sale price of which deducted from the gross purchase left the net sum of \$2,616.72 cts. due by the purchaser. On the 17th of September, 1862, the vendors applied again for a settlement, which, on the 18th, was replied to by another offer of the buyer's note with 10 days extra to run beyond the 28th September, the expiry of the 4 months' credit, which was declined, and the action was thereupon instituted on the 19th September.

On the 27th September, the 28th being Sunday, the buyer offered his accepted check for the full amount of \$2,616.72 cts., which was not accepted because he would not pay the costs of the action then incurred.

The vendors admit that the buyer's own note would have satisfied the sale conditions as to a satisfactory note—and that the offered accepted check was equivalent to cash.

The action instituted on the 19th September is in the common assumpsit form for goods sold and delivered, for the price of \$2,616.72 cts., and which the defendant then and there promised to pay, but neglected, &c.

The pleas set out the special contract, the purchase under the auction condition of an absolute credit of 4 months as a special agreement, and the consequent prematurity of the action, at the same time tendering the sum of \$2,616. 72 cts. with interest for 17 days, from 28th September to date of plea, but without costs, and praying costs against the plaintiffs.

In reply, the plaintiffs admit the mode and conditions of the sale and purchase, as stated, and allege the defendant's refusal to take advantage of the discount after one month as stipulated, and to conform to the conditions of sale, by giving his note dated at a credit of 4 months from the sale, and hence the institution of the action at the time.

The matter in dispute between the parties previous to the action was at first the difference between the simple interest offered, and 2 per cent tendered, amounting to about \$20 then, as the amount of 10 days' interest upon the note tendered, which note would have been received, had the buyer been willing to pay interest upon the extension fixed by himself, say about 25s., and lastly the costs which had accrued upon the action when the tender was made on the 27th September, and which would have been of no great amount. However trifling these differences between the parties might be, points of commercial and practical professional interest have arisen in the case and been submitted, which must now be decided.

Before settling the legal point in the case, it is right to remark, that the defendant has not in his pleadings complained either of the quality or of the alleged delay in the delivery of the teas which had been urged by him, as the ground for his claiming the extension of the time of payment, thereby impliedly admitting that the delivery was in time, and the quality correct. His tender on the 27th for the 28th, and its iteration in the plea, with interest from that time, corroborate the sufficiency of the said quality and delivery, and the defendant's own admission that the

four months in question ran from the 28th May to the 28th September, is of record in the action.

The pleas of the defendant in fact simply offer the issue of his purchase at an absolute credit of 4 months, and plainly and manifestly contradict the ground assumed by him for claiming the extension of the credit limit beyond that fixed by the conditions of sale. He was in that respect in his own wrong all through.

The contestation has become narrowed to the question of the absoluteness of the credit of 4 months from the 28th May. Upon this point, the testimony of record must be adverted to for a moment.

The auctioneer, Leeming, says, that sales for sums exceeding \$100 are credit sales, to be settled in the mean time by note. Hodgson, the plaintiffs' clerk, says, usually every thing under \$100 is cash, and over that amount is on credit.

Law, one of the plaintiffs, is acquainted with the customary conditions of sales such as that referred to in this case, which are usually cash up to a certain amount, and a term of credit for larger amounts. Up to £25, the customary terms are cash ; over that amount they are credit.

This testimony is conclusive that the term of 4 months in this sale was a term of credit.

The authorities are equally conclusive :

2 Parsons, pp. 456-7.—Contracts.—“ If the goods are sold on credit, that is, if it be a part of the contract of sale, that payment shall be made at a future day, there can of course be no suit for the price until that day. This is undeniable both in English and French jurisprudence, because in that simple case, the term is for the benefit of the purchaser, and the old axiom applies, *qui a terme ne doit rien*. ”

But if a mode or qualification be added to be performed by the buyer, then the benefit is mutual, the buyer obtains

his term of credit; and the vendor obtains a mode of assisting himself in the interval.

In this case the agreement was that the buyer should have 4 month's credit from the day of sale upon his furnishing the vendors with a satisfactory note.

He obtained his credit, but did not furnish the note. What then was the right of the vendor under the agreement?

Parsons, on Contracts, (*loc. cit.*) says: "But if it is also a part of the contract that a note shall be given immediately, which is to be payable on that future day, if this be not given, an action can at once be maintained for it—not only because it is a separate promise, but because by the practice of merchants *this note might be made, by the vendor's getting it discounted, the means of present payment.*"

Thus the mutual benefit, the credit on the one side, and the means of present payment on the other, are clearly stated.

Addison, on Contracts, p. 240—Maintains the same principle as above enunciated by Parsons, and the text writers and adjudged cases entirely concur in the right of the vendor to maintain an action *to obtain the note.*

Addison, p. 1120—If the goods are sold upon terms, that the purchaser is to give his acceptance at two, three or more months for the price, and the goods are then delivered to the purchaser, and the latter refuses to give his acceptance according to the contract, the vendor cannot forthwith bring an action for goods sold and delivered, but must sue either on the promise to give the acceptance or wait the termination of the period the bill or note had to run.

4 Term Rep., 1803, p. 146—*Mussen vs. Price*, may be considered the leading case, in which Lord Ellenborough recorded his dissent from his colleagues, who "*held* that the buyer, in such a case as this cannot be sued in an action for goods sold and delivered, but upon the special contract only, and that he could not be sued in that form of action.

till after the expiration of the term : ”—and in 3 Bos. and Pull., 1803, p. 582—Dutton vs. Solomonson, Lord Alvanley, Ch. J., who entertained the same opinion as Lord Ellenborough, yielded, and followed the rule in Mussen vs. Price, especially knowing that his colleagues in his own Court differed from him. Since that case of Mussen vs. Price, Lord Ellenborough also yielded to those rulings as seen in 9 East., 498, 1808, Hoskins, *et al.*, assignees of Deighton vs. Duperoy, and again, in 3 Campbell, 329, Hutchinson vs. Reid, in which he held that until credit expired there was no debt due, 1813. And the current of authorities since 1803, has been all that way in England. (1)

The same has been also held in Upper Canada, 5 U. C. Q. B., Rep., p. 159—Wakefield vs. Gorrie—in which the Court held that such a purchaser was one unconditionally *on credit*, and could not be treated as a purchaser *for cash* upon his refusal to furnish the note—and could not be sued on common counts before expiry of the time. Now, in the case of Mussen vs. Price, the action was for goods in common assumpsit form before the expiry of the time of credit, and the judges objected because the action was brought upon an assumpsit “implied in law, and not upon an “express assumpsit—that it was not an implied contract “but express, including the terms on which one agreed to “buy and the other to sell, for the non-performance of “which the party *had his remedy in damages* ; the vendor’s “argument going upon an assumption that the giving of “the bill was a condition upon which the credit was to be “given—said there was no such condition in the contract— “the vendee would not have the full benefit of his contract “if he is called upon for the full sum before the expiration “of the credit—but the terms of the contract were also “introduced for the benefit of the vendor, *that he might “have in his hands an instrument which he could negotiate.*” And in Brooks vs. White, Bos. and Pull., above cited,

(1) Hoskins vs. Duperoy, 9 East., 498 :—Cothay vs. Murray, 1 Camp., 335 :—Griffin vs. Longfield, 3 Camp., 364 :—Joseph vs. Knox, ditto 320 ; *id.* 329 ; *id.* 414 :—Bos. and Pull., p. 330, Brooks and White.

J. Chamber said the qualifications respecting the mode of payment are for the benefit of the purchaser, and during the time to which they relate, the seller must sue on a special contract.

There is also an American authority which is important :

21 Wendell, p. 90—Hanna vs. Mills and Hooker—In error from Superior Court, N. Y. city, in which all the English cases were referred to and commented upon. Mr. Justice Bronsdon, the presiding judge in error, having reviewed them as settled, he thus proceeds : “The right of action is “as perfect on a neglect or refusal to give the bill as it can “be after the credit has expired. The *only difference* between “*suing at one time or the other relates to the form of the “remedy ; in this case the plaintiff must declare specially ; “in the other he may declare generally. The remedy itself “is the same in both cases ; the damages are the price of “the goods. The party cannot have two actions for one “breach of a single contract ; and the contract is no more “broken after the credit expires than it was the moment “the note or bill was wrongfully withheld.”*

It is undeniable that a sale upon the conditions stated and proved in this case is a sale upon credit ; and it is equally undeniable that such credit sale coupled with the agreement by the purchaser to furnish a note for the price of the goods purchased would give immediately rights to the vendor to demand the note.

Technically the common assumpsit form for goods sold is for the price of goods sold, and promised to be paid presently, but neglected, to the vendor's damage—of what ? How is it measured ? By the price of the goods.

The special assumpsit for non-delivery of a note representing the price of those goods, but neglected or refused to be given, is also to the vendor's damages, in what ? How to be measured in that case ? Why still by the price of the goods.

In both cases the damage then is the same, namely, the price of the goods as remarked by Mr. Justice Bronsdon, and the only difference is the form of the remedy, as he observes : but though both result in damages established by the price of the goods, the two forms of action are dissimilar in this,—the evidence that would support the common assumpsit would not sustain the special assumpsit, and the proof upon the express contract would show something different from an implied contract.

Now, in our practice, we are not tied down to the strict niceties of the English forms of action, and sometimes very much to our practical disadvantage, because it becomes necessary to make up the issues by special pleadings which in many cases, in fact, do not tender issues upon the action brought, but as it were, make new demands. In this case, for instance, the form of remedy is the common assumpsit form, showing the sale and delivery of the teas for the price named with the implied contract attaching to the purchaser to make present payment. The proof in such a case is necessarily simple, that of the purchase and receipt of 81 boxes of tea for such a value, the law filling in the implied contract. But the special pleas and answer have brought into Court a special agreement, and it is that special contract, not the implied assumpsit, which is the matter of contract ; it is in fact the damage suffered by the non-delivery of the note, which would have furnished the price by means of the discount of the note for money, and that damage is the value of the goods. The case, as appears then in the pleadings, will be more plainly stated colloquially. The plaintiffs say : You, defendant, on the 28th of May, 1862, purchased our teas for the price of \$2,616. 72c., which teas were delivered to you then and there, and the price of which you promised to pay to us presently on demand. The defendant answers : True, I bought the teas for that price ; but you agreed to give me a credit of four months from the time of sale, and you cannot ask for the money until that time has expired. The plaintiffs reply :

Yes, we did agree to give you that credit, but it was on the condition that you did then and there give us a satisfactory note at four months from the date of sale, which, in commercial usage, would have given us the use of the money, by means of its discount, and without interfering with you. You have had our teas in your possession, and thereby enjoyed our capital, and having refused to furnish to us the note or its representative; you have therefore caused the damage of the price of your purchase.

In this state of the pleadings, mere technical forms disappear altogether, and the case is submitted as it in fact is. None of the English or other cases cited above present such a state of pleadings as this case, and to that extent are not strictly applicable upon the question of remedy, or form of action, or of the question of procedure; this case must be taken up and adjudged as it is, in the contestation made up for judicial decision; nor can the respondent complain, because, as before observed, he was in his own wrong in unjustly claiming before action brought an extension beyond the term of credit, and in holding and using the plaintiffs' goods, without affording to them *the means of having in their hands an instrument which they could negotiate* as laid down by the judges in the case of Mussen and Price, and which is corroborated by a similar case under French law. Dalloz. Jurisp. du Roy., 2e partie, 1835, p. 132; Meerman vs. Bettomeyer. A quantity of wine was sold, for which a credit note was to be given; the wine was delivered at once, and the note refused to be given. Action was at once instituted by the vendor against the purchaser. The case went by default against the defendant, and judgment was rendered for the plaintiff, the vendor. Upon the defendant's appeal, the original judgment was confirmed. The Court of Appeals holding that the breach to give the note gave immediate right of action to the vendor to sue for the price, upon the ground, "puisque'il est de principe en "matière commerciale que les effets de commerce sont la

“représentation d'une monnaie réelle, surtout entre négociants.”

The principle of this French decision is in exact conformity with the principle of the English cases; the note is the representative negotiable equivalent of the goods sold and delivered, and the amount claimed is the price of the goods which becomes the measure of the damage suffered by the plaintiffs from the breach of the defendant's special contract to deliver the note when demanded.

The decisions in both systems rest upon the commercial convertibility of the note into money,* and the legal implication that the note was money in a commercial sense. Under these circumstances, the judgment appealed from cannot be sustained, and the judgment must be in favor of the appellants.

MONDELET, Justice.—This is an appeal from a judgment rendered by the Superior Court at Montreal (**MONK, Justice**) condemning the respondent to pay a certain sum of money, being the amount of a purchase of packages of tea sold to him on the 8th May, 1862, at auction, by Jno. Leeming & Co., for the plaintiffs. The action was instituted on the 19th September, 1862.

The defendant has pleaded he had a right to 4 months' credit, that he offered the amount by an accepted check, but without costs: plaintiffs refused.

The Court has declared the offer by a check a legal tender.

I am of opinion, from the record and evidence, that the judgment of the Court below should be reversed.

10. The credit of four months was not an absolute credit, but four months' credit on satisfactory paper, &c., which the defendant, though bound to give, persisted in refusing, pretending at the time that he was entitled to an *absolute* credit of four months.

20. Whatever may be said as to the plaintiffs making no objection to the check offered by the defendant, still the Court below could not juridically in its judgment declare an offer made by a check to be a legal tender.

The following was the judgment of the Court of appeals :

The Court, considering that the said appellants did, on the twenty-eighth day of May, one thousand eight hundred and sixty-two, sell and deliver to the respondent the quantity of tea by him in his pleadings in this cause admitted, at and for the price and sum of two thousand six hundred and sixteen dollars and seventy-two cents, at a credit of four months from said date, upon the condition of the said respondent furnishing to the said appellants negotiable paper payable at the expiration of the said term of credit : considering that the said appellants had therefore a legal right to demand and have from the respondent, at and after the said delivery, such negotiable paper payable as aforesaid, for the amount of the said sale, and upon failure thereof by the said respondent, to institute an action at law against him for the immediate recovery of the said sum of money : considering that the said respondent did not comply with the demand of the said appellants to furnish to them the said negotiable paper before the institution of their action in this behalf, and that their said action was not premature as alleged in the pleadings of the respondent : finally, considering that the tender made and filed in this cause by the respondent on the twenty-seventh day of September, one thousand eight hundred and sixty-two, after the institution of the said action against him by the appellants was not sufficient, nor good and valid in law, under the circumstances of the case, the same having been made for the amount of the said purchase, with interest thereon from the date of the said tender only, and also less the costs of the said action : considering that in the judgment pronounced by the Superior Court, at Montreal, on the twenty-fifth day of June, one thousand eight hundred and sixty-three, affirming the suffi-

ciency of the said tender, and condemning the said appellants to pay to the respondent the costs of said suit, there is error,—this Court doth reverse and set aside the said judgment, and proceeding to render the judgment which the Court below ought to have rendered, doth condemn the respondent to pay to the appellants the sum of two thousand six hundred and sixteen dollars and seventy-two cents, the price and value of the said tea so purchased by him as aforesaid, with interest thereon from the nineteenth day of September, one thousand eight hundred and sixty-two, the date of service of process in this cause, and also their costs of suit in the Court below, as also all their costs in this Court.

BETHUNE, Q. C., for appellants.

STUART, Q. C., Counsel.

DOHERTY, for respondent.

McKAY, R., Counsel.

COUR SUPÉRIEURE.—MONTREAL.

Présent :—LORANGER, Juge.

No. 1898. { PEPIN, *Demandeur*,
 vs.
 { ROCAND DIT BASTIEN, *Défendeur*.

Jugé :—Que dans le cas d'injures verbales, la Cour ne présumera pas réconciliation ou abandon du droit d'action, de ce que les parties ont bu ensemble avant le procès.

Held :—That in a case of slander, the Court will not presume a reconciliation or abandonment of the right of action, by reason of the parties having drank together before the trial.

Jugement rendu le 2 mars, 1864.

LORANGER, Juge :—Action de dommages pour injures verbales,

Les allégations de la demande sont les allégations ordinaires en semblables matières. La défense nie les faits mis à sa charge, plaide que, fussent-ils vrais, le demandeur est sans action, parce qu'avant l'institution de la demande il a reconnu avoir pris de la paille du défendeur, et en dernier lieu, réconciliation, les parties ayant eu ensemble quelques jours avant l'assignation. La preuve d'une diffamation persistante et malicieusement répétée par le défendeur, est plus que suffisante.

Il est aussi en preuve que le défendeur, ayant été informé par son avocat que s'il faisait entrer le demandeur dans une auberge et le faisait boire, son procès serait gagné, (ainsi qu'en déposent un témoin et le défendeur lui-même) s'adressa, le 1er mars, 1863, au nommé Hilaire Hotte, le priant de lui procurer une entrevue à cet effet. Les parties se rencontrèrent chez le nommé Chevallier, hôtelier. Le défendeur pria le demandeur, ainsi que ses fils, de monter dans une chambre où les suivit Hotte. Là, les parties se parlèrent d'arrangement qui ne pût être effectué, se traitèrent sans fiel, amicalement même, si l'on en croit les témoins étrangers. Elles burent même un verre de vin payé par le défendeur, et le demandeur offrit un autre verre aux personnes présentes, le défendeur compris, ce qui fut refusé, et se séparèrent sans rancune apparente. Mais pendant toute la conversation, pas un mot ne fut dit qui comportât de la part du demandeur un abandon de son action, ou une remise de l'injure, en autant qu'elle lui donnait un droit de poursuivre en justice. Au contraire, dans tout le cours de cette entrevue, il a toujours protesté qu'il n'abandonnait pas son procès, et ne s'arrangeait pas ; et, avant même de boire, il fut d'un commun accord convenu entre le demandeur et le défendeur qu'ils plaideraient en amis.

Interrogé, le défendeur dit : J'ai demandé au demandeur s'il voulait s'arranger ; il m'a dit que oui, qu'il s'arrangerait avec \$50 et les frais. J'en ai ri, et j'ai dit au deman-

deur : " Nous allons plaider ; je vais te faire perdre. " Le demandeur a dit : " C'est bon. " De ce moment, c'était bien entendu qu'il n'y avait pas d'arrangement.

Plus tard, le défendeur s'est vanté devant témoins qu'il avait fait perdre le procès du demandeur en lui faisant prendre un verre de liqueur.

Quant à la justification, il est clair que le défendeur n'en a prouvé aucune.

Les injures proferées par le défendeur étant prouvées, le demandeur ayant justifié de son action, la question qui se présente est de savoir si le fait que les parties ont bu ensemble, et se sont traitées amicalement, constitue renonciation et abandon de l'action du demandeur.

La Cour est d'opinion que non, et doit prononcer son arrêt en conséquence :—

La Cour, etc., Considérant que le demandeur a prouvé les allégations essentielles de sa demande, savoir, qu'il a établi par la preuve qu'il a faite, que le ou vers le commencement du mois d'octobre, 1862, et à plusieurs époques subséquentes, le défendeur a tenu sur son compte des propos injurieux et diffamatoires, de nature à ternir son caractère, flétrir sa réputation et à lui faire tort dans l'opinion publique, ce qui, aux termes du droit, constitue un délit recherchant en dommages et intérêts civils.

Considérant que le défendeur n'a point fait la preuve de la justification qu'il a invoquée, et que dans le fait que les parties ont bu ensemble le ou vers le premier mars dernier, le tribunal ne saurait trouver de présomption de réconciliation de la part du demandeur qui lui ait enlevé son droit d'action, en autant qu'en l'occasion en question, et pendant toute l'entrevue que le défendeur eut avec lui, il a, à différentes reprises, protesté qu'il se réservait son droit de poursuivre en justice la réparation du délit commis envers lui par le défendeur, protestation suffisante pour faire disparaître la présomption d'abandon d'action de sa part, et que,

conséquemment, le défendeur n'a point justifié devant la Cour d'une défense valable à l'encontre de l'action du demandeur, qui est bien fondée :

A rejeté et rejette les défenses du défendeur ; et faisant droit sur la demande du demandeur, condamne le défendeur, à raison du délit ci-haut mentionné par lui commis, à payer au demandeur la somme de \$15 de dommages et intérêts civils, avec intérêt de cette date, et les dépens entiers de l'action telle qu'intentée.

BÉLANGER et DESNOYERS, pour le demandeur.

ARCHAMBAULT, pour le défendeur.

COUR SUPÉRIEURE.—MONTREAL.

Présent :—LORANGER, Juge.

No. 1985.	{	REGINA,..... <i>Sur Informtion,</i>
		vs.
		UNE QUANTITÉ DE JOAILLERIE.
		et
		SAUNDERS,..... <i>Réclamant.</i>

Jugé :—Que sur saisie de certains articles contenant des gravures et représentations indécentes, comme importées en cette province en contravention aux lois des douanes, il n'est pas nécessaire que le fait de l'importation soit prouvé ; mais que l'importation est présumée à moins de preuve contraire.

Held :—That upon seizure of certain articles containing indecent pictures and engravings, as imported into this province in contravention to the customs laws, it is not necessary that the fact of importation be proved ; but that the importation will be presumed unless the contrary be proved.

Jugement rendu le 2 mars, 1864.

Information contre une quantité de joaillerie contenant 289 épingles de cravate, et 27 *charmes* contenant des peintures et dessins d'un caractère immoral et indécent, dont l'importation est prohibée par les lois de la province, le tout de manufacture étrangère. Les conclusions demandent la confiscation des effets importés.

Une réclamation des articles saisis fut produite par le nommé Alexander Saunders qui les réclamait pour les raisons énumérées dans son plaidoyer.

Il allègue que, le 12 janvier, 1862, le réclamant était en possession d'une quantité de joaillerie contenant au-delà de 500 épinglettes de différentes descriptions, et une quantité d'épingles en os, et des *charmes* faits des mêmes matériaux.

Que ces articles étaient contenus dans une caisse de sûreté en fer, dans le magasin du réclamant, et n'étaient pas exposés en vente. Que le nommé Thomas Barry se donnant pour un officier de douane, se présenta dans son magasin et le somma d'ouvrir cette caisse de sûreté, sans quoi il requerrait la coopération d'un serrurier pour l'ouvrir. Que le réclamant l'ouvrit, croyant au droit du dit Barry, et que là-dessus Barry emporta 289 épingles de cravate, partie en or et partie en os, et aussi 27 *charmes* en os, que le réclamant croyait être les mêmes que ceux saisis.

Qu'à l'époque de la dite saisie le réclamant était le propriétaire des articles, et que cette saisie n'était pas justifiable.

Le réclamant niait l'importation des articles saisis et leur caractère immoral et indécent ; et il concluait à ce que la saisie fut déclarée illégale, et que les articles saisis lui fussent rendus.

Les réponses étaient générales.

A l'enquête le réclamant admit que 53 des épingles saisies contenaient à leur intérieur des gravures et dessins d'un caractère immoral et indécent.

L'informant, de son côté, admit que le reste, savoir, les 263 épingles et *charmes* saisis ne contenaient point de peintures ou dessins de ce caractère.

De la part de l'information, un témoin, William P. Weir, déposa qu'il avait accompagné Barry, l'officier de douane,

au magasin du réclamanant ; que dans une caisse de sûreté, ils avaient trouvé contenue dans des tiroirs une quantité d'épingles et de *charmes* ; que dans chacun des tiroirs il se trouvait des épingles contenant des gravures d'un caractère indécent. Ces gravures étaient à l'intérieur des épingles et se voyaient au moyen d'un tube magnificateur. Toutes les épingles furent saisies.

Thomas Barry, l'officier de douane qui avait fait la saisie, corrobora ce témoignage.

La seule question importante qui était soulevée par le réclamanant, était fondée sur la section 84 du chap. 17 des statuts refondus du Canada, et il prétendit que cette clause n'exemptait point l'officier de douane de l'obligation de prouver l'importation. Cette clause était directement contre lui. Elle dit en termes exprès que *l'onus probandi*, en semblable matière, retombera sur le réclamanant.

Ci-suit le jugement de la Cour :

Considering that it is established in evidence that out of the 289 breast pins and 27 charms seized in this cause by Thomas Barry, one of the customs officers, fifty-three of the said pins contained paints or pictures of an indecent and immoral character, as admitted by claimant himself, and that by the terms of the chapter 17th of the Consolidated Statutes of Canada, the importation in this Province of such articles of an immoral and indecent character is prohibited, whereby and by force of said statute the said fifty-three pins became liable to be forfeited :

Considering further that the rest of the breast pins and charms seized, namely, 263 breast pins and 27 charms did not contain such paints and pictures of an immoral and indecent character, and that such 263 pins and 27 charms were not and are not liable to such seizure and forfeiture :

Maintains the information as to the said fifty-three pins containing said paints and pictures of an immoral and indecent character, declares the same to be forfeited, and

doth discharge the seizure as to the other 263 pins and 27 charms, orders the same to be restored to the claimant who has proved his right of property thereto, with costs against said claimant.

DORION, Proc.-Gén., pour S. M.

DUNLOP et BROWNE, pour le réclamant.

COUR SUPERIEURE.—MONTREAL.

Présent :—LORANGER, Juge.

No. 1831. { SAUNDERS, *Demandeur*,
vs.
BARRY, *Défendeur*.

Jugé :—Qu'un officier de douane qui, en pratiquant la saisie de certains effets prohibés par les lois de douane, a fait enlever d'autres articles dont il ne pouvait déterminer la nature, sans un examen prolongé, ne peut être responsable des dommages résultant de la saisie de ces derniers effets.

Held :—That an officer of Customs who, in making a seizure of certain prohibited effects by the Customs laws, has caused the taking away of other effects the nature of which he could not determine, without a prolonged examination, is not responsible for damages resulting in consequence of the seizure of these last mentioned effects.

Jugement rendu le 2 mars, 1864.

LORANGER, Juge :—Action de dommages pour avoir pratiqué la saisie dans la cause de Regina vs. Une Quantité de Joaillerie, et Saunders, réclamant. Les faits qui donnèrent lieu à la poursuite se trouvent détaillés dans la cause de Regina, sur information, contre une quantité de joaillerie, et Saunders, intervenant, et nul doute que l'action doit être déboutée. Non seulement l'officier de douane était justifiable en faisant la saisie, mais encore c'était son devoir de le faire. (1)

Jugement :

Considering that, by law, no action in the nature of the present action can lie for the recovery of articles seized by a customs officer, acting or pretending to act as such in

(1) *Vide supra*.

virtue of the Revenue Laws of this Province, and that it is established in evidence that the articles claimed have been seized by the defendant, as such customs officer acting or pretending to act in virtue of such Revenue Laws, and that an information concerning the said seizure and claiming the forfeiture of the articles seized, has been duly instituted, and is now pending before this Court :

Considering that the defendant, a customs officer, was justifiable in seizing the 289 breast pins and 27 charms mentioned in the declaration, inasmuch as 53 of the said pins being together with the articles claimed inclosed in certain trays in the plaintiff's shop, contained paints and pictures of an indecent and immoral character, the importation of which is prohibited by the Customs Laws of this Province, embodied in the chapter 17th of the Consolidated Statutes of Canada ; that the said defendant had just reason to believe that the whole of the articles seized contained prints and pictures of the said immoral and indecent character ; that moreover he had but difficult means to discriminate the prohibited articles from the others, and that no action can lie against him on account of the said seizure, doth dismiss the present action, with costs against plaintiff.

DUNLOP et BROWNE, pour le demandeur.

ABBOTT et DORMAN, pour le défendeur.

BANC DE LA REINE, }
 EN APPEL. } DISTRICT DE MONTREAL.

Présents :—DUVAL, Juge-en-Chef, MEREDITH, MONDELET
 et BADGLEY, Juges.

FISHER..... *Appelante.*

et

GAREAU..... *Intimée.*

Jugé, par la Cour Supérieure :—Que, dans l'espèce, il y avait preuve d'un premier mariage du nommé Liscom, aux États-Unis, et qu'un second mariage par lui contracté en Canada, avant le décès de la première femme, était absolument nul, quoiqu'il n'apparaissait d'aucune mauvaise foi de la part de la seconde femme, laquelle ne pouvait réclamer de droits matrimoniaux par la forme d'action qu'elle avait adoptée.

En appel :—Que l'action de la demanderesse, la seconde femme, ne pouvait procéder contre l'intimée, en qualité de tutrice, le mineur qu'elle représentait n'étant ni héritier, ni légataire universel du mari défunt, mais seulement légataire particulier.

Held, in the Superior Court :—That, in the case submitted, there was evidence of the first marriage of one Liscom, in the United States, and that a second marriage contracted in Canada, before the decease of the first wife, was absolutely null, although there did not appear any bad faith on the part of the second wife, who was not entitled to claim any matrimonial rights by the form of action which she had adopted.

In appeal :—That the action of the plaintiff, the second wife, could not be maintained against the respondent, in her quality of tutrix, the minor whom she represented being neither the heir or universal legatee of the husband, but only a particular legatee.

Jugement rendu le 9 mars 1864.

L'appelante était veuve de feu Samuel Liscom, en son vivant demeurant à Argenteuil, dans le Bas-Canada. Le 16 Janvier, 1804, elle avait épousé Samuel Liscom, et le consentement des parties avait été reçu à Pointe-Fortune, par le Colonel William Fortune, alors un des juges de paix de Sa Majesté, qui en dressa acte dans les termes suivants :

“ January 16th, 1804.—

Samuel Liscom and Hannah Fisher married by Wm. Fortune Esq. Witnesses present : D. Louis Siméon, Leroy, Jos. Fortune and Thomas Patrick Fortune. ”

Ce mariage n'ayant été précédé d'aucun contrat, les biens des époux tombèrent sous le régime de la communauté de biens, les deux époux étant, lors de leur mariage, domiciliés à Argenteuil, où ils vécurent continuellement,

savoir : ledit Samuel Liscom, jusqu'à son décès qui eut lieu en octobre, 1854, et où l'appelante demeurait encore à l'époque de l'institution de l'action. Une fille naquit de ce mariage le 26 avril, 1807. Pendant le mariage, Liscom acquit des propriétés, entr'autres le No. 16 et partie du No. 17, côté nord de la Rivière Rouge dans la Seigneurie d'Argenteuil, formant en tout 4 arpents de terre de front sur 30 de profondeur ; le No. 16 fut acquis en 1819, et la partie du No. 17 en 1829. L'appelante en vertu de la communauté qui existait entr'elle et son mari, avait droit, alléguait-elle, à la moitié de cette propriété qui avait été acquise pendant la durée de la dite communauté. L'intimée était tutrice de Samuel Borner, *alias* Samuel Liscom, en faveur duquel feu Liscom avait légué la propriété entière de ces héritages en vertu de son testament du 21 décembre, 1850.

Ce testament, disait l'appelante, n'avait pu la priver de sa part de communauté dans ces héritages, c'est pourquoi elle poursuivait l'intimée, qui s'était emparé de la totalité de ces héritages, et qui refusait de livrer la moitié à l'appelante, et cette dernière demandait à être déclarée propriétaire de cette moitié, ainsi que de la moitié des fruits et revenus depuis le décès de son mari, à faire partage de ces biens suivant le cours ordinaire de la loi, et à ce qu'il lui fut rendu compte des fruits et revenus de sa part.

L'intimée par ses exceptions admettait être en possession des héritages en question, en sa qualité de tutrice, et en vertu du testament de Liscom.

L'intimée plaida à cette action que l'appelante n'avait jamais été mariée à Samuel Liscom, mais que ce dernier, avant son prétendu mariage avec l'appelante, avait contracté mariage à Greenwich, dans les Etats-Unis d'Amérique, que sa femme vivait encore à Greenwich ; que l'appelante connaissait ce fait, lors de la célébration de son mariage, et que le mariage de l'appelante se trouvait sans effet et nul ; que l'appelante, depuis 40 ans, ne vivait plus

avec Samuel Liscom, qui avait acquis ses biens dans cette période de temps ; que l'appelante n'avait en aucune manière contribué à l'achat ou à l'amélioration de ces propriétés, qu'enfin Liscom les avait légués à Samuel Borner, *alias* Samuel Liscom, dont elle était la tutrice.

Les questions soulevées dans la cause, étaient les suivantes : 1o. Samuel Liscom, avait-il été marié à Greenwich, dans les Etats-Unis d'Amérique avant d'épouser l'appelante ? 2o. Si Liscom n'avait pas contracté ce mariage à Greenwich, avait-il légalement et valablement épousé l'appelante ? avait-elle le droit de demander l'exercice de son droit de communauté sur les héritages en question ? et 3o. Supposant le mariage de Liscom avec Persis Burr, valable, et conséquemment celui de l'appelante nul, cette dernière, si elle avait contracté ce mariage de bonne foi, pouvait-elle exercer ses droits sur les biens de la communauté, et quels étaient ses droits ?

La preuve offerte par l'intimée du mariage de Samuel Liscom, à Greenwich, reposait sur la déposition de trois témoins ; Polly Liscom, qui se disait la fille de Samuel Liscom, Persis Liscom, qui se disait la femme de Samuel Liscom, et enfin William Thompson qui avait épousé Polly Liscom.

Persis Liscom, se disait fille de Samuel Liscom, elle ne produisit pas son extrait de baptême ou de naissance, elle se souvenait de Samuel Liscom, qu'à une époque où elle n'avait que trois ans, la seule fois qu'elle l'eût vu.

Persis Burr, disait qu'elle avait été mariée à Samuel Liscom, en 1792, elle ne savait pas s'il en avait été rédigé acte. Elle avait vécu dix ans avec lui, ne se rappelait en quelle année il l'avait laissée, et n'avait depuis reçu qu'une seule lettre de lui, à peu près dans l'année après qu'il l'eût quittée.

William Thompson, le mari de Persis Liscom, avait fait des recherches pour trouver un acte de mariage de sa belle-mère, mais inutilement ; en 1834, il était allé à St. André, voir Samuel Liscom, qui l'avait appelé son gendre.

L'intimée avait allégué dans ses défenses, que l'appelante connaissait le mariage antérieur de Samuel Liscom ; elle ne fit ni essaya de faire aucune preuve de cette allégation.

SMITH, Justice :—This is an action to account brought by the widow of Liscom, as *commune en biens*, against Liscom, legatee. The defendant pleaded that the plaintiff was not *commune en biens* ; for although she had been married by a magistrate in due form, in Canada, her husband had previously been married, viz. in the year 1792, in the state of Massachusetts. It appeared that there were no public registries of births in the state of Massachusetts till after the year 1800. But a daughter of the first wife gave some evidence of having seen her father when he left. She was but three years old ; but she had a ring on her finger which would not come off, and he said he must cut it. Then her mother, though very old, stated she was married to this man. He thought, therefore, that it was proved that Liscom had a wife living at the time when he married the present plaintiff. Her action, therefore, must be dismissed. But no doubt a woman who had been imposed upon, and, in *good faith*, had married a man who had another wife, possessed rights which she could maintain in law ; but she could not do it by this form of action.

Ci-suit le jugement dont est appel, prononcé le 28 Juin, 1862.

“ The Court &c. Considering that the said plaintiff hath failed to establish the material allegations of her said action, as set forth in the declaration in this cause, and that at the time of the marriage of the said plaintiff with the said Samuel Liscom, in the year one thousand eight hundred and four, before William Fortune, esquire, Justice of the Peace, he, the said Samuel Liscom, was a married man, he, the said Samuel Liscom, having in the year one thousand seven hundred and ninety two, intermarried with one Persis Burr, at the town of Greenwich, in the state of Massachusetts, one of the United States of America, and

that she, the said Persis Burr, was, at the time of the celebration of the plaintiff's marriage with the said Samuel Liscom, then living, and that the said marriage is thereby inoperative, null and void, and that, by law, the said plaintiff's claims as the wife of the said Samuel Liscom, are thereby barred from having and maintaining the conclusions of her said action : the Court doth therefore dismiss the said action with costs.

DUVAL, Chief-Justice.—The action was instituted against the respondent as if she had been universal legatee of the late Samuel Liscom, when in fact she was *légataire particulière*, and the action is badly brought. The question as to the validity of the marriage, raised by the pleadings, does not therefore come up, and the judgment of the Court below will be confirmed.

Ci-suit le jugement de la Cour d'appel :

Considérant que cette action a été intentée contre la défenderesse, en sa qualité de tutrice dûment nommée en justice à Samuel Borner, *alias* Samuel Liscom, son fils mineur, pour obtenir le partage des biens composant la communauté alléguée avoir ci-devant existée entre la demanderesse et le nommé Samuel Liscom, avec lequel la demanderesse allègue avoir été mariée, considérant que le mineur, Samuel Borner, n'est ni l'héritier, ni le représentant en loi du dit Samuel Liscom, que la demanderesse allègue avoir été son époux, et n'a aucune qualité pour consentir ou procéder au partage des biens de la dite communauté, et, qu'en conséquence, dans le jugement prononcé par la Cour Supérieure, à Montréal, le 28e jour de juin, 1862, déboutant la demanderesse de son action avec dépens, il n'y a pas erreur, cette Cour confirme le dit jugement, et condamne l'appelante à payer à l'intimée, en sa dite qualité, les frais du présent appel.

MOREAU, OUMET et CHAPLEAU, pour l'appelante.

ROBERTSON, A. pour la demanderesse.

ABBOTT et DORMAN, pour l'intimée.

COUR SUPÉRIEURE.—MONTREAL.

Présent :—LORANGER, Juge.

No. 1447. { BRISSON, Demandeur.
vs.
LAFONTAINE dite SURPRENANT. Défenderesse.

Jugé :—Que le droit de correction accordé à l'instituteur, ne doit être exercé que dans les cas de nécessité, et seulement au degré proportionné à l'offense et aux circonstances, et que l'instituteur est passible de dommages-intérêts s'il excède ces bornes.

Held :—That the right of correction given to the teacher, must only be exercised in cases of necessity, and only so far as it is in proportion to the offence and to the circumstances, and that the teacher will be subject to damages if he exceed these limits.

Jugement rendu le 2 mars, 1864.

LORANGER, Juge.—Action en dommages et intérêts civils contre une sous-maîtresse d'école. Fait imputé :—châtiments corporels excessifs, infligés sur la personne de l'enfant du demandeur, âgé d'environ six ans. La défense nie le caractère excessif des châtimens, et est fondée sur le droit de correction légitime appartenant à la défenderesse, sous-maîtresse dans l'école que fréquentait l'enfant du demandeur.

Il résulte de l'enquête, que le 24 décembre, 1862, l'enfant du demandeur, du nom d'Edmond et âgé de six ans, se trouvant à occuper un rang distingué dans sa classe, fut requis par la défenderesse de faire son exercice de lecture, ce qu'il ne pût faire parce qu'il avait confondu la page du livre indiquée pour cette lecture. Là-dessus, la défenderesse le fit descendre de son rang qu'elle décerna à l'élève qui occupait le rang suivant. L'enfant se prit alors à pleurer, et la défenderesse insista de nouveau pour lui faire faire sa lecture. L'enfant ne pouvant se rendre à cette injonction, la défenderesse le fit supplanter par un troisième élève, et ainsi de suite par tous les autres jusqu'au dernier, lui enjoignant toujours de lire, et l'enfant continuant toujours à pleurer. Alors, elle le frappa pendant dix minutes ou un quart-d'heure sur la main gauche, et peut-être sur les deux, et sur la tête avec un martinet qui

avait été donné par les commissaires d'école de la localité à la maîtresse d'école en chef, pour la correction des enfants indociles ou récalcitrants. Ce martinet consistait, suivant la description faite par les témoins et la Demoiselle Boire elle-même, dont le témoignage a été offert par la défenderesse, en une lanière de cuir longue de quinze pouces, large de trois et épaisse de quelques lignes. Après cette correction faite au milieu des cris de l'enfant qui voulait retourner chez ses parents, elle l'envoya boire, et l'enfant lut ensuite sa leçon, malgré que sur ce point le témoignage ne soit pas unanime.

Il paraît que l'enfant avait eu sur le dessus de la main gauche un bouton ou clou qui n'était pas encore complètement guéri. Il retourna chez son père, se plaignant de souffrance à la tête—il avait l'empreinte de deux coups ou barres rouges sur une joue, et des douleurs à la main gauche qu'il avait enflée à l'intérieur et enflammée à l'extérieur, le demandeur conduisit son fils chez un médecin à la demande même de la défenderesse qui le visita aussi ; à l'égard de la lésion faite à la main gauche de l'enfant, ce médecin prescrivit pour lui et lui donna ses soins pendant quelques jours ; l'enfant fut retenu au lit pendant un espace de temps assez considérable, une ecchymose, suivant le témoignage du médecin consulté, se déclara, il y eut suppuration et la main lui aboutit.—Depuis ce temps jusqu'au temps de l'enquête, il paraît que l'enfant a refusé de retourner à l'école par crainte des maîtresses d'école.

Ces faits qui sont abondamment prouvés par la demande, n'ont pas été contredits par la défense qui, ne pouvant nier le fait de la flagellation infligée à l'enfant, s'est rejetée sur l'impossibilité que des coups de martinet infligés dans la main d'un enfant pussent produire ecchymose et suppuration sur le revers de la main et la faire aboutir. Deux médecins ont été appelés de sa part pour contredire le témoignage du médecin produit par la demande ; mais n'ayant jamais vu la blessure, ils n'ont pu former leur opinion que

sur la description qu'en avait faite leur confrère, et leur témoignage est impuissant à contredire le sien. La défense dit que le châtement infligé par la défenderesse dans la main de l'enfant, ne pouvait produire les résultats signalés par la demande ; mais il ne faut pas oublier que la main était déjà malade, qu'il y avait déjà probablement un travail inflammatoire dans le tissu cellulaire, qu'en cet état une ecchymose était bien propre à se manifester, et qu'une suppuration en pouvait être la conséquence naturelle. La défense prétend n'être pas plus responsable des conséquences qui sont résultées du châtement que si la main eût été saine, et que la défenderesse ayant eu le droit de corriger l'enfant comme elle l'a fait à cause de sa désobéissance à exécuter ses ordres, elle ne peut être plus recherchée que si la main de l'enfant n'eût pas déjà éprouvée de lésion.

La première question qui se présente est donc celle de la légitimité de la correction. La défenderesse était-elle justifiable en corrigeant l'enfant comme elle l'a fait ? Sur ce point, le tribunal est décidément défavorable à sa prétention. Sans refuser aux Instituteurs un droit modéré de correction légitime dans les cas de nécessité absolue, sur les enfants indociles ou récalcitrants, et cela dans l'intérêt de la discipline de l'école et de l'éducation des élèves, l'on ne peut voir dans le fait d'une institutrice qui, sur une faute aussi légère commise par un enfant de six ans, le flagelle aux mains et à la tête pendant dix minutes ou un quart-d'heure, qu'un grave abus d'autorité, un assaut qui constitue un délit punissable au criminel même.

Si elle n'avait pas le droit d'infliger ce châtement comme elle l'a fait, elle doit porter la peine de toutes les conséquences qui en sont résultées. Il doit donc y avoir un jugement prononçant des dommages et intérêts contre elle, et elle doit être condamnée à tous les frais encourus par le demandeur pour parvenir à cette condamnation. A raison du montant considérable auquel ces frais s'élèvent, la Cour n'accordera point un chiffre de dommages aussi élevé qu'elle l'eût fait sans cela, mais elle doit, néanmoins, jus-

qu'à un certain point prendre pour les mesurer l'appréciation défavorable qu'elle fait de la conduite de la défenderesse, et rendre un jugement, qui, en consacrant le principe sur lequel il est fondé, servira aussi d'enseignement à ceux à qui la loi confie l'éducation des enfants, £10, de dommages et intérêts civils, est le chiffre que j'établis avec les dépens entiers de l'action.

Ci-suit le jugement de la Cour :—Considérant que, sans refuser aux Instituteurs un droit de correction modérée contre les élèves indociles ou récalcitrants, droit qui ne peut s'exercer que dans les cas de nécessité pour le maintien de la discipline des écoles, l'intérêt de l'instruction, et à un degré proportionné aux offenses commises contre la discipline scolaire, il n'en est pas moins vrai que tout châtiment qui excéderait cette limite et qui serait motivé par l'arbitraire, le caprice, la colère ou la mauvaise humeur, constitue un délit punissable, comme les délits ordinaires, et que dans les cas proposés aux tribunaux où l'on prétend que la correction présente ce caractère, ils doivent former leurs appréciations sur la nature de l'offense, l'âge de l'élève, sa faute, le plus ou moins de gravité du châtiment et les circonstances dans lesquelles il a été infligé.

Considérant que dans l'espèce actuelle, vu l'âge de l'enfant du demandeur, et la légèreté de l'infraction de discipline qu'il avait commise, la correction excessive que la défenderesse lui a fait souffrir, qui a produit des résultats préjudiciables à la santé de l'enfant et a exposé le demandeur et sa famille à des inquiétudes et des inconvénients fâcheux, a constitué un abus d'autorité et offert le caractère d'un délit recherchant en dommages et intérêts.

Considérant, en conséquence, que le demandeur était fondé à porter la présente demande en dommages et intérêts civils devant ce tribunal, qu'il l'a prouvée, et que la défenderesse n'a offert ni prouvé aucune défense légitime à l'encontre de cette demande, déclare frivole et non fondée la dite défense, et faisant droit sur la demande, con-

damne la défenderesse à payer au demandeur à raison du délit qu'elle a commis le 26 décembre, 1862, en infligeant à son fils Edmond, âgé de six ans, en la paroisse de St. Constant, sans droit ou justification, un châtiment corporel excessif, la somme de £10 à titre de dommages et intérêts civils, avec intérêt de cette date, et les dépens entiers de l'action.

LANCOT, pour le demandeur.

HUBERT, pour la défenderesse.

COUR SUPÉRIEURE.—MONTREAL.

Présent :—LORANGER, Juge.

No. 681. { Bousquet, Demandeur,
vs.
RENOIS, Défendeur,
et
LE DIT RENOIS, Demandeur en faux,
vs.
LE DIT BOUSQUET, Défendeur en faux.

Jugé :—Que, dans l'espèce, les moyens invoqués sur inscription en faux contre un testament n'étaient pas suffisamment justifiés pour faire mettre de côté la minute du testament et l'expédition produite.

Held:—That, in the case submitted, the means relied upon on an inscription en faux against a will, were not sufficiently established to procure the setting aside of will and of the copy produced.

Jugement rendu le 2 mars, 1864.

Mérites de l'inscription de faux :

LORANGER, Juge.—Une action pétitoire fut intentée par Bousquet contre Renois, son beau-père, réclamant l'hérédité de feue dame Charlotte Adam, l'épouse en secondes noces de Renois, en vertu de son testament solennel reçu à St. Marc, le 14 janvier, 1862, devant Pigeon, notaire, instituant le demandeur son légataire universel, contre ce testament

et l'expédition produite par le demandeur, Renois, le défendeur, a pris une inscription de faux, dont les principaux moyens sont :

10. Que la minute compulsée, n'est pas la vraie minute du testament de la dite Dame Charlotte Adam, rédigée par le notaire Pigeon, et signée de lui et des témoins instrumentaires ; qu'elle a été le fruit de la fabrication du notaire à l'aide des témoins instrumentaires, après la mort de la testatrice, que cette minute a été fabriquée par le notaire qui l'a signée et l'a fait signer des témoins instrumentaires, et l'a substituée à la vraie minute du testament reçu, parceque la première minute contenait des défauts de forme qui l'eussent invalidée ; ce moyen donne un état circonstancié du contexte de la première minute, et une description calligraphique fort minutieuse de sa rédaction, et faisant la comparaison de la minute compulsée avec celle qu'il prétend avoir été soustraite, il conclut au rejet de celle qui a été produite.

20. Le second moyen dit qu'en supposant que la minute compulsée serait la vraie minute du testament et qu'elle n'aurait pas été substituée à la première, elle devrait encore être déclarée fausse, en ce qu'il est faussement porté à la dite minute, que la testatrice a requis le notaire Pigeon, et les témoins instrumentaires Blain et Vary de recevoir son testament ; qu'elle ne connaissait même pas le notaire Pigeon et le témoin Blain, et que ces derniers ne la connaissaient pas non plus ; qu'elle ne connaissait que bien peu l'autre témoin Vary, et qu'elle n'a pu avoir l'idée de requérir sa présence pour recevoir son testament, qu'elle ne l'avait vu que rarement et n'avait aucune confiance en lui ; que ce furent le défendeur en faux, et Vary, son ami intime, qui allèrent requérir le notaire Pigeon, demeurant dans une autre paroisse que celle qu'habitait la testatrice, de recevoir son testament, et que ce fut Pigeon lui-même qui pria le témoin Blain de l'accompagner pour recevoir le testament en question.

3o. Par le troisième moyen, le demandeur en faux prétend que la réquisition aux notaires et aux témoins, a été faite par le défendeur en faux, et a été de sa part une manœuvre frauduleuse pour s'assurer du nombre de personnes requis pour recevoir un testament, et pour obtenir, sous l'apparence des formes, un testament faux et frauduleux, contenant un legs de tous les biens de la testatrice en sa faveur, comme au préjudice du demandeur en faux, et de Louise Bousquet la sœur unique du défendeur en faux, qui ne figure au testament que pour un legs de \$1000.00, payable avec délai et sans intérêt; pendant que la testatrice avait laissé des biens au chiffre de \$18000.00; ce legs de \$1000, en faveur de la dite Louise Bousquet, n'ayant été inséré au dit testament, que pour cacher la manœuvre frauduleuse du défendeur en faux, et s'assurer le reste de la succession.

4o. Le quatrième moyen de faux, dit que le testament énonce frauduleusement, qu'à l'époque de sa confection, la testatrice était *saine de corps, esprit, jugement, mémoire et entendement*; qu'à l'époque de sa confection et longtemps avant, affaiblie par l'âge et de longues maladies, elle avait perdu l'usage de ses forces physiques, de sa mémoire et de sa volonté, et n'avait point la somme de raison suffisante pour faire un testament valable; et au soutien de ce moyen, le demandeur en faux invoque certains faits qui ne paraissant d'aucune importance à la Cour, n'ont pas besoin d'être cités.

5o. Le cinquième moyen déclare le testament entaché de fausseté à cause qu'il y est énoncé, que le dit testament *a été fait, dicté, nommé et expliqué mot à mot* au notaire et aux témoins par la testatrice; que la testatrice n'avait pas la somme de raison, mémoire, jugement et volonté pour dicter un testament aussi long et aussi spécial; que ce testament ne contient pas l'expression de la volonté libre de la testatrice, qui était incapable du consentement nécessaire pour lui donner validité.

60. Le sixième moyen prétend que le testament a été suggéré par le défendeur, soit directement par lui-même, soit par l'entremise de son ami, le témoin Vary.

70. Le septième moyen avance que le testament n'a pas été dicté par la testatrice, mais qu'il a été préparé d'avance par le notaire sur les suggestions du défendeur en faux, ou de son ami, le témoin Vary; que le notaire et les témoins ne sont restés qu'une vingtaine de minutes au domicile de la dite Charlotte Adam; que cette dernière n'est restée qu'une dizaine de minutes dans la Chambre où le testament a été reçu; qu'il eût fallu au moins trois heures pour le recevoir, le lui lire, parapher les renvois et le signer; que le notaire et les témoins ont profité de l'absence du demandeur en faux pour se rendre chez la testatrice; que le défendeur en faux et le témoin Vary surveillaient les mouvements de la dite testatrice qu'ils voulaient circonvenir; et que le notaire et le témoin Blain sont allés, en arrivant à St. Marc, chez le témoin Vary, d'où ils se sont rendus au domicile de la testatrice.

80. Le testament par sa rédaction, son style, les renvois qui s'y trouvent, porte à sa face la preuve de sa fausseté il n'a pas été dicté par la testatrice parceque dans le legs de mille piastres fait à la dite Louise Bousquet, celle-ci est désignée par les mots " Louise Bousquet, une de mes filles " pendant qu'elle était la seule fille de la testatrice, et que si cette dernière eut dicté elle-même ce legs, elle aurait fait usage de l'expression " ma fille. "

9. Le mot " Marc " porté en marge au verso du second feuillet, n'a été écrit sur la minute que longtemps après sa confection, et qu'il doit être supprimé de la dite minute en la supposant vraie; que supposant que le mot Marc aurait été écrit en même temps que le reste de la minute, il se trouve en marge, et n'est ni paraphé ni approuvé par le notaire et les témoins, et doit être supprimé. Que le mot Marc, surchargé d'encre, écrit avant le mot Marc qui se

trouve en renvoi, accuse que les syllabes " laire " qui commencent la ligne qui suit ont été raturés postérieurement à la confection du testament.

10o. Ni le notaire, ni les témoins n'ont signé le dit testament ni paraphé les renvois lors de sa confection.

En addition à ces différents moyens de faux qui se rapportent également à la minute et à l'expédition, le onzième prétend que la copie diffère de l'original sous plusieurs rapports, et pour cette raison en sus des autres, l'on demande la suppression de l'expédition.

Les réponses aux moyens de faux sont générales.

En résumé, les moyens de faux sont donc :

1o. Que la minute compulsée, n'est point la vraie minute du testament, qui a été soustraite par le notaire, qui l'a remplacée par la minute compulsée qu'il a fabriquée après coup, et qu'il a fait signer par les témoins.

2o. Que si la minute compulsée est bien la minute originale, elle doit être déclarée fautive, parce que le testament n'a pas été l'œuvre de la volonté libre de la testatrice, qui ne desirait point faire de testament, mais qu'elle a été le fruit des manœuvres du défendeur en faux, qui, de concert avec le témoin Vary, aurait requis le notaire instrumentaire, qui lui-même aurait requis le témoin Blain, pour l'assister, se seraient rendus chez la testatrice, avec un testament préparé d'avance, et qu'ils auraient reçu au domicile de la testatrice sans participation légale de sa part, et que le dit testament n'a pas été fait, nommé et dicté par elle, mais qu'il a été suggéré par le notaire et les témoins ou quelqu'un d'eux.

3o. Que la testatrice à l'époque où elle a fait ce testament, n'avait pas la raison suffisante pour le faire.

4o. Que le St. Marc, qui se trouve sur le verso du second feuillet a été ajouté après coup, et que s'il a été écrit en

même temps que le reste du testament, se trouvant en marge et n'étant pas authentiqué, il doit être supprimé.

Avant d'entrer dans l'examen de la preuve, je dois dire qu'il est un point qui m'a frappé par son étrangeté, c'est le défaut d'intérêt du demandeur en faux à poursuivre l'inscription. Il ne prétend pas par ses moyens que si elle est maintenue l'inscription de faux lui profitera. Il dit, au contraire, que si le testament est supprimé, la succession de la testatrice se partagera également entre le défendeur en faux et Louise Bousquet, ses seuls enfants, en vertu de la loi des successions *ab intestat*. Il s'expose certainement au reproche d'exciper des droits d'autrui, cependant dépouillons la preuve.

Sur le premier point, la fabrication de la minute compulsée et sa substitution à la minute originale, la seule preuve produite par le demandeur en faux, consiste dans le témoignage de M. John Fraser, qui prétend avoir vu, le 3 juillet, 1863, la première minute entre les mains du notaire instrumentaire qui était venu la communiquer aux avocats du demandeur en faux, et que trouvant entre cette minute et celle compulsée des différences résultant de la dissemblance du papier sur lequel elles étaient écrites, du caractère des deux écritures, tant dans le corps de l'acte que dans les renvois, de la manière dont les signatures sont groupées, de la longueur des lignes et d'autres indices calligraphiques, en conclut sans hésitation que la première minute a été soustraite, et qu'on y a substitué une minute fabriquée. Mais ce témoignage, outre qu'il est misérablement insuffisant pour faire rejeter un acte semblable, est victorieusement renversé par les clercs du notaire qui déposent de faits matériels, démontrant jusqu'à l'évidence que la minute compulsée est bien réellement celle qui a été rédigée le 14 janvier, 1862. Faisons donc immédiatement justice de cette prétention extraordinaire, traitons la minute rapportée comme la vraie minute, et voyons quelle preuve le demandeur en faux a faite pour l'attaquer et la faire supprimer.

Pour premier moyen contre ce testament le demandeur en faux dit qu'il n'a pas été l'œuvre de la libre volonté de la testatrice, mais qu'il lui a été arraché et suggéré.

Les faits au soutien de ce moyen sont les suivants :

Le 11 janvier, 1862, Madame Renois avait fait un codicile révoquant un premier testament en date du 8 novembre, 1852, ce que son fils, le défendeur en faux, ayant appris, il lui en fit reproche sous l'impression qu'il était que par ce codicile, elle l'avait déshérité au profit du demandeur en faux, son mari. Il lui rappela qu'elle lui avait souvent promis de faire son testament en sa faveur, et il est naturel de penser qu'il y mit de l'obsession, bien qu'il n'y ait pas de preuve à cet égard. La testatrice étant probablement d'opinion aussi que par ce codicile elle avait fait à son fils une injustice qu'elle voulait réparer, lui dit, que s'il pouvait trouver un moyen de remédier à ce qui avait été fait, elle était prêt à lui donner ses biens. Il fut alors convenu que le défendeur en faux irait quérir un notaire devant lequel elle ferait un nouveau testament. Le lendemain, le 12, étant un dimanche, le demandeur en faux accompagné de Vary, dont il a été parlé ci-haut, se rend de St. Marc, où demeurait la testatrice, à St. Hilaire, et prie le notaire Pigeon de venir chez la testatrice le mardi suivant, jour où devait s'absenter le demandeur en faux auquel on voulait cacher la connaissance de ce nouveau testament, et d'emmener des témoins. Le jour fixé, le 14, le notaire, accompagné du nommé Blain qu'il avait requis comme témoin, se rend à St. Marc, passe devant la maison de la testatrice et se rend chez Vary, qui lui avait été en toute probabilité indiqué d'avance, et l'invite à se rendre avec Blain et lui chez la testatrice pour recevoir son testament, Vary les prie de le dévancer et les réjoint ensuite chez la testatrice. En arrivant le notaire demande à Madame Renois s'il est vrai qu'elle l'a fait demander? Elle lui répond que oui, et que c'est pour faire son testament. La testatrice, le notaire et les témoins entrent dans un appartement où ils se renferment, et le notaire se met en frais d'instrumenter. La testatrice lui dit alors : je

veux donner tout mon bien à mon garçon, à la charge de payer mille piastres à sa sœur. Le notaire se met à écrire, il avait écrit ainsi pendant environ vingt minutes quand la femme du défendeur en faux vient avertir la testatrice que quelques personnes désiraient la voir. Elle sort de l'appartement, le notaire écrit deux ou trois lignes pour terminer une phrase, la testatrice revient environ quinze minutes après. Le notaire se remet à l'ouvrage, finit le testament et le lit. Après ou pendant la première lecture, la testatrice fait remarquer qu'il pourrait arriver que le paiement de mille piastres en un seul paiement, fatiguerait son fils (son garçon comme elle l'appelait,) et voulait que cette somme fût payable en deux ans, la moitié un an après son décès et l'autre moitié deux ans après. Le testament qui contenait l'institution du défendeur en faux, sans ce délai, est modifié en conséquence, et il est signé par les témoins et le notaire ; ces derniers prennent quelques rafraichissements et s'en vont. Le défendeur en faux était absent, et pour sauver les apparences comme il le dit lui-même, il avait emmené avec lui le neveu du demandeur en faux, afin de lui dérober la connaissance de ce qui devait se passer.

Le testament a-t-il été suggéré à la testatrice au moment même de sa confection ? quelqu'un l'a-t-il usé de captation, à son égard, à cet instant ? Certainement non. La preuve est concluante sur ce point. Jamais testament ne peut être fait plus librement que celui que Madame Renois a fait, le 14 janvier, 1862. Mais lors de l'argumentation l'on a voulu trouver une preuve matérielle du fait que le testament n'avait pas été écrit en entier sous la dictée de la testatrice et en sa présence, et qu'il avait été préparé d'avance, dans le peu de temps que le notaire et les témoins sont restés dans la maison de la testatrice. Blain, le seul témoin interrogé à cet égard, dit qu'ils sont restés de une heure vingt minutes à une heure et demie, et que sur ce temps la testatrice s'est absentée pendant quinze à vingt minutes, durant lesquelles le notaire a suspendu ses écritures. De sorte que suivant ce témoin, la rédaction du testament et l'accomplissement des

formalités d'usage peuvent avoir employé tout au plus une heure. C'est bien peu de temps pour rédiger un testament ; cependant, à la rigueur, il n'est-pas impossible à un notaire de rédiger, pendant l'espace d'une heure, un testament de quatre pages et demie écrit sur du papier ordinaire, ayant une marge ordinaire et d'une écriture assez grosse. Puis il ne faut pas perdre de vue le peu de précision avec lequel on apprécie généralement la durée du temps. Ne serait-il pas infiniment dangereux d'inférer qu'un testament a été préparé d'avance du court espace de temps employé pour sa rédaction ? Je pourrais passer sous silence un autre indice invoqué par le demandeur en faux. La sœur du légataire à qui un legs particulier de mille piastres est fait, est désignée comme " Louise une de mes filles " et la testatrice n'en avait pas d'autre. Or, dit-on, cette indication " une de mes filles "—fait voir que ce ne peut être la testatrice qui a dicté ce legs ; elle eût dit, Louise ma fille, au lieu de dire, Louise une de mes filles, n'en ayant qu'une. L'erreur, au contraire, ne peut-elle pas avoir été le plus naturellement du monde commise par le notaire qui ignorait que la testatrice n'avait qu'une fille ?

Le testament n'a certainement pas été suggéré lors de sa rédaction ; mais peut-être l'a-t-il été avant ? L'insistance avec laquelle le défendeur en faux a reproché à sa mère de ne l'avoir pas institué son héritier, peut-elle avoir formé un moyen de captation capable de faire annuler le testament, comme surpris à la testatrice ?

Je crois que non.

10. Furgole, Testaments, chap. 5, sect. 3, vol. 1, p. 247 :

" Il n'y a guère de matières où l'on trouve plus de variétés et d'embarras dans les écrits des auteurs français, et dans la jurisprudence des arrêts des Cours Supérieures, que dans les questions qui naissent de la captation, et de la suggestion des dispositions testamentaires.

" Cela vient de ce que les auteurs français abandonnant

les règles du droit romain, se sont fait une idée particulière de la captation et de la suggestion ; idée qu'ils se sont formée sur la disposition de quelques coutumes qui sont en trop petit nombre pour former le droit commun du Royaume, encore moins dans les Pays où l'on suit le Droit Romain."

20. Nouveau Denisart, vbo. Captation-Suggestion, sect. 1, paragraphe 5, page 187, *in finis*.

"Ainsi on peut dire que la captation et la suggestion proprement dites, et séparées de toute idée de violence, de dol, de fraude, et d'artifices, n'ont aucun fondement dans les textes du Droit Romain. "

30. Furgole, *Loco Citato*.

"Les interprètes du Droit écrit ne sont pas tombés dans cet inconvénient, parce qu'ils ont pris pour guide les lois, à l'esprit desquelles ils se sont conformés ; par là ils ont compris la véritable nature de la suggestion et de la captation, et les conditions qui doivent accompagner ces moyens pour rendre inefficaces les dispositions testamentaires. Ils ont donc cru que ces moyens ne pouvaient être bons, qu'en autant qu'ils seraient accompagnés de dol et de fraude."

Idem, paragraphe 15, p. 250.

Il est permis de s'attirer des libéralités par des prières, des caresses et des services.

Idem, paragraphe 45, page 260.

"Dès que l'on s'est formé une juste idée de la suggestion et de la captation, et que l'on est persuadé, comme il nous paraît qu'on doit l'être, que ce ne sont pas des moyens de nullité différents du dol et de la fraude, on s'aperçoit que la première opinion qui déclare suggérée la disposition faite sur l'interrogat d'autrui, et la seconde, qui la fait consister en la simple persuasion, n'ont aucun fondement dans le droit, et que la troisième opinion qui la fait consister au dol, ou en la fraude, est la seule véritable ; après quoi les doutes qui

peuvent naître de cette matière ne paraîtront plus si difficiles à résoudre. ”.

Ce fut d'après ces principes que l'avocat général de Magalon, plaidant devant le Parlement d'Aix, dans une espèce où arrêt fut rendu en 1779, sur le testament du sieur Fournier, s'exprima en ces termes.

“ La captation opère la nullité des dispositions testamentaires lorsqu'elle est accompagnée de dol et de fraude. Tel est l'esprit des lois Romaines. Ces lois autorisent les dispositions qui ont été attirées par des caresses, des prières et des services. Elles présument que ces démarches n'influaient pas d'une manière dangereuse sur la volonté du testateur ; mais elles prohibent d'une manière expresse, la violence, la ruse, l'artifice ; ces moyens illicites substituant à la volonté du testateur une volonté étrangère ; ils privent le testateur de l'état de liberté que les lois et la raison exigent de lui ; souvent même, ils le forcent à dicter des dispositions que son cœur désavoue. ”

Pour ce qui est du défaut de raison de la testatrice, la manière intelligente dont elle a fait son testament, jointe à la déposition des notaires Fraser et St. Aubin, qui tous deux déposent de sa parfaite santé d'esprit, et de la possession entière de son intelligence, quand le onze janvier, deux jours auparavant, ils avaient reçu son codicile, et cela en commun avec plusieurs autres témoins entendus, réfutent victorieusement les avancés craintifs des témoins du demandeur en faux, dont aucun n'a même dit qu'elle avait perdu l'usage de ses facultés mentales quand elle a fait son testament.

Le moyen relatif au mot St. Marc, qui se trouve en marge, mérite à peine une mention ; et les différences entre l'original et la copie, sont si minimes et de si peu d'importance qu'il serait inutile de s'arrêter à ce dernier grief.

Sur le tout, je suis d'opinion que le testament doit être confirmé.

Ci-suit le jugement de la Cour :

La Cour :—Considérant que malgré ce qu'en disent au contraire les moyens de faux, la minute produite par Mr. Pigeon, notaire, en obéissance à l'interlocutoire rendu dans la cause et compulsée par le greffier du tribunal, est bien la vraie minute du testament de ·feue Dame Charlotte Adam, en son vivant veuve du demandeur en faux, reçu devant le dit Mr. Pigeon, notaire, et témoins, à St. Marc, le 14 janvier, 1862 :

Considérant que le dit testament a été l'œuvre de la libre volonté de la dite Dame Charlotte Adam ; que le dit testament n'a été ni suggéré ni surpris par le défendeur en faux ni par d'autres personnes ; qu'à l'époque où elle l'a fait, la testatrice était saine d'esprit, mémoire, jugement et entendement, avait la capacité et était dans les conditions voulues par la loi, pour faire un testament, et qu'elle a bien et vraiment, suivant les exigences de la loi, fait, dicté et nommé aux notaire et témoins le dit testament, qui a été mal à propos argué de faux, et qui est d'ailleurs revêtu de toutes les formes légales pour lui donner validité et authenticité :

Considérant, de plus, que l'expédition produite, malgré quelques variantes de phraséologie, impuissantes à en affecter la substance, qui se trouvent entre la dite expédition et la minute, est cependant une copie suffisante de la dite minute, et que, pour toutes ces raisons, il n'y avait lieu à l'inscription de faux ni contre la minute, ni contre l'expédition, a rejeté et rejette la dite inscription de faux et moyens de faux, avec dépens.

Et la Cour ordonne que la minute du dit testament déposée au greffe, et qui fait partie du dossier, soit remise au dit notaire Pigeon, pour reprendre sa place dans son notariat.

CARTIER, POMINVILLE et BÉTOURNAY, pour le demandeur en faux.

DORION et DORION, pour le défendeur en faux.

QUEEN'S BENCH } DISTRICT OF MONTREAL.
 APPEAL SIDE.

Before: — DUVAL, MEREDITH, MONDELET and BADGLEY,
 Justices.

McGRATH *Appellant*,
 and
 O'CONNOR *Respondent*.

Held:—That a sale of real estate made by the son to the father, will be declared simulated and fraudulent, and will be set aside, at the instance of creditors, notwithstanding proof of payment of the price of sale, upon sufficient evidence that the father had no pecuniary means.

Jugé:—Qu'une vente d'immeuble faite par le fils à son père, sera déclarée simulée et frauduleuse, et sera mise au néant, à la demande de créanciers, nonobstant la preuve de numération du prix, s'il y a preuve suffisante du défaut de moyens pécuniaires du père.

Judgment rendered the 1st March, 1864.

BERTHELOT, Justice.—This is an appeal from a judgment of the Superior Court at Montreal, rendered on the 30th day of September, 1861, between the appellant, plaintiff and respondent, opposant in the said Court, dismissing the plaintiff's contestation of the opposant's opposition *afin de distraire*.

John O'Connor, the defendant in the Court below, and the son of the opposant, on the 9th November, 1859, purchased, on credit, a vacant lot in Montreal, and undertook to build a house thereon. For this purpose he obtained the necessary timber materials from the appellant, and one George C. Boynton and Ostell, on credit. The carpenter work, the plastering, &c., were done *on credit*; the house was completed only in the beginning of May, 1860, and the labor necessary to build the same remained wholly unpaid for, as well as the larger portion of the materials.

In April, 1860, the appellant and the defendant's other creditors pressing him for payment, he, on the twentieth of April, 1860, made over the said house and lot to his father, the opposant, nominally for £100, cash paid, &c., but as he afterwards stated to the witness O'Brien, in

order to save the property from being seized by his creditors." The house and lot were all the property that the defendant had, and his father was an old and poor man who had no need of such property, nor any apparent means of paying for it.

The appellant, hearing of the transaction, on the twelfth of May, 1860, instituted his action against the defendant, and recovered judgment by default, and, the defendant still living in and holding possession of the said house, he, the plaintiff, seized the same on execution, to which seizure the respondent filed his opposition.

The appellant contested the opposition upon the ground of *fraud and collusion* between the defendant and the respondent—son and father. He alleged, among other things, that the sale by the defendant to the respondent was of all the defendant's property, and meant by the parties to it as a fraud against the appellant and the defendant's other creditors ; that the opposant had no means of paying for the property ; that the sale was simulated ; that the defendant was insolvent at and before the alleged sale ; that for these and other reasons in the contestation alleged, the sale was null and void,—the legal conclusions from these premises for annulling the sale and dismissing the said opposition were taken. The opposant answered generally, and the Court, after the adduction of evidence on both sides, rendered the following judgment :

La Cour, après avoir entendu les parties par leurs avocats sur le mérite de l'opposition faite et filée en cette cause par le dit opposant, avoir examiné la procédure, pièces produites, et le témoignage, et avoir sur le tout délibéré : Considérant que le demandeur n'a pas suffisamment et légalement prouvé qu'il avait un titre de créance contre le dit défendeur au temps de la passation de l'acte de vente du vingt avril, mil huit cent soixante, reçu devant Maître Isaacson et confrère, Notaires, par lequel le défendeur a vendu à l'opposant l'immeuble saisi en cette cause : Con-

sidérant de plus que cet acte de vente n'est pas un acte à titre gratuit, mais bien un acte à titre onéreux, ainsi qu'il y en a la preuve, et qu'il n'y a aucune preuve que l'opposant ait été complice de la fraude que le demandeur prétend avoir été commise vis-à-vis de lui par le défendeur en vendant et aliénant le dit immeuble au préjudice de ses créanciers, a renvoyé la dite contestation de l'opposition, et adjuge et ordonne qu'il soit accordé main levée à l'opposant de la saisie de l'immeuble saisi sur le défendeur en cette cause, le tout avec dépens contre le demandeur, &c.

C'est de ce jugement qu'il fut interjeté appel.

DUVAL, Justice.—The question is whether the sale was genuine, or whether it was a sale to defraud the creditors of their rights. The Court is of opinion that it was a fictitious sale, and that there was no idea of transferring the property from the hands of the son to the father. The property was put into the hands of the father to save it, as the son stated to one of the witnesses, from being seized by his creditors, he being at the time insolvent. The sale being fictitious, the opposition of the father should have been dismissed. The judgment of the Court below must, therefore, be reversed.

MONDELET, Justice.—I have never, in the course of a long practice at the Bar, and many years on the Bench, been more satisfied, than that, in the present cause, a daring fraud has been practised. In January, February and April, 1860, the defendant was indebted to the plaintiff who was his creditor. He then had a house, and, all at once, he sells it to his father, the opposant, a poor old man, without means, who afterwards continues to live with the defendant in the same house. He knew his son's position, he heard his son, the defendant, boasting of his object in selling the house, viz: to protect the property from the creditors, he, of course, assented to that.

The defendant is, unquestionably, in bad faith; the opposant, in my opinion, is also in bad faith.

Supposing, for the sake of argument, that the opposant was in good faith, for instance that he were a stranger, not knowing anything of the defendant's affairs, it would not follow that the defendant could then divest himself of his property and laugh at his creditors. Such a principle, immoral in itself and against law, consequently, would be destructive of all honesty and security in human affairs, and would destroy that confidence which is the soul of transactions between man and man.

In the old Court of Queen's Bench and in the Inferior Term, and in many cases since I have been on the bench, such transactions have been frowned upon, and deservedly.

I think the judgment appealed from should be reversed.

It incorrectly assumes, 1o. that the plaintiff had no sufficient claim against the defendant.

2o. That the opposant was in good faith.

The first motive is unfounded in fact.

The second is unfounded in fact and in law.

BADGLEY, Justice, giving the judgment of the Court.

The defendant bought a lot on credit and erected thereon a brick house, the materials for which were obtained on credit. On the 20th April, 1860, being then pressed by the *fournisseurs de matériaux*, and by the plaintiff in particular, he sells the property to his father for £280, whereof £150 for the land, £30 for ground *rente* due and £100 cash. The latter was said to have been counted out in bills, \$5 and \$10, in presence of the defendant's brother, Timothy O'Connor, and of his brother in law, Drew. The father, the purchaser of the property, had been brought out to this country in 1857, at his son's expense; in 1858, he was a common laborer in the city, and could not pay, except by his labour, for a trifle of groceries which he required, since then, he went about the city with a basket, either as a beggar or a labouring man. It is manifest that the father, the opposant,

had not the means to pay £100 in cash, and it is in evidence that the defendant had, before and since the sale, endeavoured to raise money on the property. But beside all this, in a conversation with O'Brien, the painter, in the presence and hearing of the opposant, apparently without objection on his part, the defendant said that "his creditors were coming on him before he was prepared to pay them, and he was under the necessity of making over the property to the opposant, to obtain delay so as to procure money to pay them." He also told O'Brien, in the opposant's hearing when speaking of the plaintiff's demand for materials furnished, that "if the plaintiff would give him a discharge for three cents, he would see him d....d before he'd give it."

"La simple participation des personnes avec lesquelles le débiteur pratique ces traités suspects à des actes dont elles ont pu ignorer le but secret, ne les constitue en fraude qu'autant qu'il est établi que le mauvais dessein du débiteur leur était connu. (1)

"C'est donc cette connaissance qui doit être prouvée, et, pour qu'elle soit utile à tous les créanciers, il suffit qu'elle ait eu lieu, à l'égard d'un seul : ainsi, le tiers qui a traité avec le débiteur, sachant que celui-ci ne pactisait avec lui que pour tromper un créancier, fût-il dans l'ignorance que ce débiteur avait d'autres créanciers, pourra être évincé pour chacun de ces derniers ; la mauvaise action qu'il a commise le fait sortir du rang des tiers de bonne foi, que la loi protège ; et tous ceux dont elle blesse les intérêts, ont action contre lui." (2)

The opposant was proved to be without means, no attempt is made to show where the £100 came from ; the defendant continues to reside upon the premises sold—and the opposant knew the fraudulent object of the sale. There is no doubt that it was a simulated sale and not an honest

(1) Chardon, p. 372, No. 206.

(2) Ibid., No. 207.

transaction. , The defendant's deposition goes for nothing, not having been accepted by the plaintiff under the Statute. But apart from this, the evidence is abundant to show that the plaintiff was a creditor at the date of the deed, and that the opposant was an accomplice in the fraudulent manufacture of the deed. The grounds set out in the judgment of the Superior Court appealed from repose upon the opposant's good faith to some extent, but as they are not sustained by the evidence, the judgment does not appear to be well founded.

The Court, &c.—Considering that at the date of the said deed of sale in contestation in this cause, made and executed between the said defendant and the said opposant, his father, to wit ; on the 20th day of April, 1860, the said defendant was largely indebted to divers creditors for materials furnished, and work and labour had and given in and about the construction of the said house, in the said deed of sale mentioned, and that the said Patrick O'Connor, the said opposant, was in necessitous circumstances and totally without the means of making the said purchase or of paying the price therefor, as in the said deed of sale set out ; considering that the sum of money in the said deed mentioned, as having been paid by the said opposant to his said son, the defendant, for the said house and premises, was not so paid *bona fide* ; considering that it has been established by the evidence of record that the said sale was so made for the purpose of placing the said house and premises beyond the immediate legal action of the creditors of the said defendant, and that the said defendant, notwithstanding the said sale, hath continued to possess and enjoy the said house and premises uninterruptedly, and that the said deed of sale was made and executed by and between the said defendant and opposant, parties thereto, knowingly and purposely with a fraudulent intent, and that the said deed of sale was and is therefore fraudulent ; considering that in the judgment pronounced by the Superior Court at the city of Montreal, on the 30th day of September, 1861,

dismissing the contestation by the said appellant, of the opposition of the said respondent in the Court below, there is error, this Court doth reverse and set aside the said judgment of the 30th day of September, 1861, and proceeding to render the judgment which the Court below ought to have rendered, doth maintain the said contestation of the said appellant against the said opposition made and filed by the said respondent, opposant in the said Court below, to the seizure and sale of the said house and premises under and by virtue of the writ of execution *de terris* issued out of the said Superior Court at the suit of the said appellant, plaintiff as aforesaid, and declaring the said deed of sale, executed as aforesaid between the said defendant and opposant, to be and to have been fraudulent, null and void, doth annul and set aside the same, and doth declare the said defendant to have been, at the time of the seizure and taking in execution under the said writ of execution of the said house and premises, the owner of the same, and finally doth dismiss the said opposition of the said opposant with costs, &c.

. DOHERTY, for appellant.

KERR, for respondent.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
 EN APPEL.

Présents:—DUVAL, MEREDITH, MONDELET et BADGLEY,
 Juges.

BÉRIAU..... *Appelant*,

et

McCORKILL..... *Intimé*.

Jugé:—Que, dans l'espèce, le mari, légataire universel de sa femme, pour laquelle il avait endossé un billet promissaire, était tenu au paiement du montant du billet, nonobstant le défaut de protêt, la Cour considérant qu'il était suffisamment prouvé qu'il avait consenti à l'omission du protêt, au nom de sa femme, pour éviter des frais, et que de fait, la femme n'était qu'un prête-nom pour couvrir le commerce du mari.

Held:—That, in the case submitted, the husband, universal legatee of his wife, for whom he had endorsed a promissory note, was bound to pay the amount of the note, notwithstanding there was no protest, the Court considering it was sufficiently established that he had consented, in the name of his wife, that there should be no protest, to avoid costs, and that, in fact, the wife was only a prête-nom to cover the trading of the husband.

Jugement rendu le 1er mars, 1864.

Le 14 février, 1857, à Farnham, dans le district de Bedford, Esther Vincelette fit et souscrit un billet par lequel, à deux mois de cette date là, elle promit payer au bureau de la Banque du Peuple, à Montréal, à l'ordre de Marie-Anne Poitras, épouse de Joseph Bériau, marchande publique, et séparée de biens d'avec son mari, une somme de £33.13.4 courant.

Marie-Anne Poitras étant devenue propriétaire de ce billet l'endossa en faveur de l'intimé. Cet endossement fut fait par Bériau, pour son épouse.

Ce billet étant devenu dû et exigible le 15 avril, 1857, ne fut point protesté pour conserver l'endossement de Marie-Anne Poitras.

Le 13 août, 1859, l'intimé intenta son action devant la Cour de Circuit pour le Comté de Missiquoi; contre Esther Vincelette, et contre l'endosseur, Marie-Anne Poitras. Par cette action l'intimé alléguait l'existence du billet qui était

devenu sa propriété par l'endossement de Marie-Anne Poitras. Il fut admis que ce billet n'avait pas été protesté à son échéance dans les délais prescrits par la loi pour conserver la responsabilité de l'endosseur, mais il était allégué que c'était à la demande de cette dernière que ce billet n'avait pas été protesté, et qu'elle avait promis lui en payer le montant, s'il consentait de ne le point faire protester, tout aussi bien que s'il en faisait faire le protêt, et que ce fut à raison de cette promesse que le billet ne fut point protesté, puis il concluait à une condamnation solidaire contre le faiseur et l'endosseur de ce billet. Après le rapport de cette action devant la Cour, Marie-Anne Poitras est décédée. Son époux, Joseph Bériau, qu'elle avait institué légataire en usufruit de ses biens, et son exécuteur testamentaire, intervenant dans la cause, y reprit l'instance, et pour défense à l'action prétendit que feu son épouse, Marie-Anne Poitras, avait été libérée de son endossement de ce billet, vu le défaut de protêt, et d'avis de protêt, et il nia qu'elle eût jamais renoncé à ses droits sous ce rapport, et qu'elle eût fait aucune convention par laquelle elle fut devenue obligée au paiement de ce billet.

L'intimé fit entendre deux témoins pour établir le fait que Marie-Anne Poitras avait dispensé l'intimé de la nécessité de faire protester le billet en question, mais il faillit dans cette preuve. Néanmoins, la Cour de Circuit pour le district de Bedford, par son jugement du 28 janvier, 1863, condamna l'appelant, comme représentant Marie-Anne Poitras, à payer à l'intimé le montant de ce billet, avec intérêt et dépens.

L'Appelant demandait l'infirmité de ce jugement pour les raisons suivantes :

1o. Parce que ce billet n'a pas été protesté dans les délais prescrits par la loi, et que Marie-Anne Poitras que représente l'appelant, est devenue en conséquence libérée de son engagement comme endosseur de ce billet :

2o. Parce qu'il n'a pas été prouvé, que Marie-Anne Poitras

ait dispensé l'intimé de la nécessité de faire protester ce billet à son échéance, en lui promettant d'en payer le montant :

30. Parce Jésoeph Bériau n'a jamais été autorisé par son épouse à dispenser l'intimé de la nécessité de faire protester ce billet :

40. Parce que la preuve produite dans la cause, n'a pas même établi le fait que Bériau eût dispensé l'intimé de faire protester ce billet.

MONDELLET, Juge, dissente.—Le demandeur allègue lui-même que le billet pour le recouvrement duquel il intenta son action, n'a pas été protesté contre l'endosseur Marie-Anne Poitras.

Il allègue de plus, que cette dernière, par son agent, Joseph Bériau, l'a exempté de ce protêt, et a promis de payer le montant du billet.

Je suis d'avis que ni par la preuve testimoniale ni par les faits et articles, est-il prouvé :

10. Que l'exemption de protester a eu lieu.

20. Que le défendeur, époux de Marie-Anne Poitras, depuis décédée, eût aucune autorité d'exempter du protêt.

30. Que le défendeur ait exempté le demandeur de la nécessité du protêt.

40. Que quand bien même il y aurait quelque preuve testimoniale (ce qui n'est pas le cas) elle serait inadmissible.

Le jugement dont est appel, qui est rendu contre le défendeur comme légataire universel usufruitier et exécuteur testamentaire de feu son épouse, la dite Marie-Anne Poitras, décédée, et dont il a repris l'instance, devrait être infirm

DUVAL, Juge.—Il n'y a pas de doute que le défendeur a dispensé l'intimé de la nécessité de faire protester le billet. Mais la question s'élève de savoir s'il pouvait lé-

galement se désister du droit au protêt pour sa femme. Je pense qu'il le pouvait, d'autant plus que la preuve fait voir que quoique le négoce des appelants fût conduit sous le nom de la femme, c'est le mari qui faisait tout. Examiné sur faits et articles, le défendeur, cependant, se contente de répondre à un certain nombre d'interrogatoires, "je ne me rappelle pas." C'est une manière de répondre que les tribunaux ne peuvent pas approuver. Le jugement de la Cour Inférieure doit être confirmé avec dépens.

Le jugement de la Cour de Circuit est confirmé.

LEBLANC et CASSIDY, pour l'appelant.

ROBERSON, A. et W., pour l'intimé.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE.

Before :—DUVAL, MERRIDITH, MONDELET and BADGLEY,
Justices.

DUNN..... *Appellant.*

and

BISSONETTE..... *Respondent.*

Held :—1o. That where, in an action by a carpenter for work and labor, the defendant pleaded that the work was done under a verbal contract and for a fixed sum, the Court ought not to send the case to *experts* or arbitrators to decide as to the existence or non-existence of the contract.

2o. That, without consent of parties, the Superior Court has no power to refer a cause to arbitrators, *amicales compositeurs*.

3o. That a judgment homologating an award of arbitrators named without such consent, and condemning the defendant to pay the amount mentioned in the award, will be reversed with costs.

Jugé :—1o. Que lorsque, dans une action par un menuisier pour ouvrages faits, le défendeur a plaidé que les ouvrages avaient été faits en vertu d'un contrat verbal et pour un prix fixe, la Cour ne devra pas renvoyer la cause à des experts ou arbitres pour décider quant à l'existence ou non existence du contrat.

2o. Que, sans consentement des parties, la Cour Supérieure ne peut référer une cause à des arbitres, *amicales compositeurs*.

3o. Qu'un jugement homologuant une sentence d'arbitres nommés sans tel consentement, et condamnant le défendeur à payer le montant mentionné dans la sentence, sera infirmé avec dépens.

Judgment rendered the 1st March, 1864.

The point decided in this case will sufficiently appear

from the remarks of the Judge who rendered the judgment in Appeal.

DUVAL, Justice.—This was an action brought by the respondent, who is a carpenter, against the appellant, for work and labor done in repairing the defendant's house and barns, and for removing certain buildings, the action being in fact for eleven and a half months wages at so much per day, and for a small sum paid to workmen. The defendant pleaded that the work was done under a verbal contract, that the plaintiff had not finished the work, but had abandoned it, and had moreover been paid what work he had done for the defendant. After a great deal of evidence had been gone into, the Court after the hearing on the merits ordered the cause to be sent, not to *experts*, but to arbitrators, *amiables compositeurs*, who accordingly proceeded and made a report which was homologated by the Court, and the defendant condemned to pay the sum awarded. The Court had no authority to send the case to arbitration without the consent of parties. It was argued on behalf of the respondent, that this Court must take it for granted that such consent had been given, otherwise the Court below could not have sent the case to arbitration. But the record shows no such consent. On the contrary, the defendant moved to set aside the report on the express ground that no such consent was given, and also upon another ground, that as there was a question of contract or no contract raised by the pleadings, this question could not be left to arbitrators, but was to be decided by the Court. This last ground was a good reason for not sending the case to arbitrators or *experts*, without a decision having been first rendered. The judgment appealed from must therefore be reversed; after careful consideration of the voluminous evidence of record, the Court does not see that the plaintiff has proved that any specific amount of work had been done, or any amount beyond the payments made; the action must, therefore, be dismissed.

Judgment:—Considering that there does not appear in

the said record and proceedings any consent of the parties in the said cause, to wit, the appellant, plaintiff below, and respondent, defendant below, for a reference of the said cause to arbitrators and *amiables compositeurs* and that by law such reference could not have been ordered *mero motu* of the said Court below: Considering that the said cause was inscribed for hearing upon the merits after the *enquête* of the parties had been duly had and perfected, and that the said reference to arbitrators and *amiables compositeurs*, was so ordered by the said Court below, after the hearing of the parties upon the merits of the said cause: Considering that the proceedings upon the said order of reference, and the award and report thereon, were not founded in law, and that in the said interlocutory judgment of the 26th day of April, 1862, pronounced by the said Court below, ordering such reference, and in the final judgment pronounced by the said Court on the first day of December, 1862, thereon, there was error, and that upon the merits of the said cause, there was no evidence sufficient to sustain the action of the said respondent against the said appellant, this Court doth reverse and set aside the said interlocutory judgment of the said 26th day of April, 1862, and also of the said first day of December, 1862, and proceeding to render the judgment which the Court below ought to have rendered; doth dismiss the action of the said respondent with costs to the appellant, &c.

ROBERTSON, A. and W., for appellant.

LANCOT, for respondent.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE.

Before :— DUVAL, Chief-Justice, MEREDITH, MONDELET
 and BADGLEY, Justices.

THE CHAMPLAIN and ST. LAWRENCE RAILWAY
 COMFY.....Appellant.

and

SIMARD.....Respondent.

Held :—That, in the case submitted, the appellants could not be made responsible for the loss of horses killed upon their track, without proof of neglect on their part, either in the conducting of their trains, or in the maintaining of their fences; the company moreover being under no obligation to make such fences secure against horses—horses not being comprised under the term *Cattle*.

Jugé :—Que, dans l'espèce, les appelants ne pouvaient être responsables de la perte de chevaux tués sur leur chemin, en l'absence de preuve de négligence de leur part, soit dans la conduite des trains, ou dans l'entretien des clôtures; la compagnie n'étant pas d'ailleurs obligée de faire telles clôtures à l'épreuve de chevaux, qui ne sont pas compris sous la désignation de *Bétail*.

Judgment rendered the 9th March, 1864.

This was an appeal from a final judgment rendered in the Circuit Court for the district of Montreal, on the 24th November, 1862, condemning the appellant, (defendant in the Court below) to pay to the respondent (plaintiff in the Court below) the sum of £37.10s. as damages;—in the words of the judgment, “ *pour les causes et raisons mentionnées dans la déclaration en cette cause.* ”

The chief question involved in the appeal, was, as to the liability of a Railway Company towards parties who set up claims for losses, or pretended losses, incurred through the fault and negligence of the parties themselves.

The plaintiff, by her action, in the Court below, sought to recover from the defendant, the sum of \$150, as damages which she, the respondent, pretended she had suffered by the loss of two horses, killed, as she alleged, on the appellant's railroad.

In the respondent's declaration, there was no allegation to the effect that the horses in question were killed by any,

of the trains, locomotives, or cars of the appellant, or by any of the servants or *employés* of the Company, or through their carelessness or negligence. The respondent merely alleged that owing to the bad condition and insufficiency of the fences along the line of railroad, the horses got off her property on the night of the 10th of September, 1861, and went upon the railroad, and were then and there killed, (*"ont là et alors été tués"*) There was no allegation as to how, or by whom the horses were killed, and it was not alleged, or shewn, by the respondent, that the appellant was bound to maintain the fences in question, or liable for not doing so.

To this action the appellant, (under protest that no liability could attach to the defendant by reason of anything set forth in the plaintiff's declaration), pleaded, in effect, that the defendant was not in any manner liable, or indebted toward the plaintiff, who had no right of action whatever:—That there were good and sufficient fences on both sides of the defendant's railroad, constantly maintained and kept in good order, and such as by Law required:—That it was impossible for horses, or other cattle, to have passed over or through these fences, unless they were purposely broken, taken down, or opened:—That if any horses belonging to the plaintiff were killed, as pretended by her, (which, however, the defendant did not admit) it was owing entirely to the culpable neglect and fault of the plaintiff in allowing them to stray and wander about at large, and in not taking proper care to prevent them from going upon the railroad, where they were trespassing against the will of the defendant, who used every proper precaution to keep them off the said road.

The appellant, *d'abondant*, pleaded that the defendant had never been put *en demeure* by the plaintiff, with regard to the fences being out of order, or insufficient; nor had the defendant ever been notified or called upon by the plaintiff to repair them; and that no complaint regarding them was

ever made by the plaintiff, up to the time of the alleged accident.

That by reason of the premises, no fault or blame could attach or be imputed to the defendant for, or by reason of, the pretended killing of the said horses.

The appellant also pleaded a *défense au fonds en fait*. The respondent answered generally.

The judgment rendered is in the following terms :

“ La Cour, &c., condamne la défenderesse à payer à la demanderesse la somme de trente-sept livres et dix chelins, du cours actuel de la Province du Canada, de dommages, pour les causes et raisons mentionnées dans la déclaration en cette cause ; avec intérêt sur la dite somme à compter de ce jour, jusqu’à l’actuel paiement, et aux dépens, &c.

BADGLEY, Justice.—The plaintiff’s declaration alleges that on the 10th September, 1861, the defendants’ Railroad then and long before traversed the plaintiff’s property in the parish of Blairfindie, *une propriété appartenant à la demanderesse*. That on the said 10th September, and before and since, the defendants’ fences were in bad order, &c. That by reason of their bad state and insufficiency, two horses belonging to the plaintiff, worth \$150, which were pasturing on said property adjoining to the railroad, left the property during the night of the 10-11 September, and got upon the defendants’ railroad opposite to plaintiff’s land, and were then and there killed, to plaintiff’s damage of \$150, by the fault and neglect of the defendants.

The defendants filed an exception and a *défense au fonds en fait*.

By the exception they allege the sufficiency of their fences ; that horses and cattle could not have passed through them unless purposely broken ; that the loss happened by the plaintiff’s negligence in allowing her animals to stray on

the defendants' track without their permission; that the plaintiff should have notified the defendant of the defectiveness of the fences, if they were not sufficient, and that no blame in the matter attached to the defendant.

The plaintiff's evidence, besides the proof of her property in the horses, of their value and of a *description sommaire* of a piece of land, her alleged property traversed by the rail-road, has reference solely to the state of the defendants' fences, generally, and all the five witnesses produced by her, two of them, her son-in-law and farm servant, to the particular place or *pagée de clôture* where the horses got out. The defendants' fences are described as being eighteen inches high by one witness, as thirty by another, as such that they could easily be *enjambée*, by a third, and finally as so bad by all of them, that the wonder is, any animals whatever on any of the adjoining properties could be induced to forego their natural straying propensities. The *pagée* in question is described as having one picket more than half unsound, and as to the plaintiff's horses, that they were quiet and docile, not accustomed to stray, not *malins aux clôtures*, as the serving man says, and would not even try to break a good fence as says the son-in-law.

This testimony, in substance, is a declaration of the bad order of the defendants' fences generally, and of the particular outlet *pagée* in particular, which the horses selected, as it would appear from having one unsound picket.

There is no proof of the plaintiff's title to the said property said to be hers, no proof of the defendants' negligence in running their trains, none that a train did run that night, and none that the animals were killed by a train at all. The only proof is that the horses were in the pasture adjoining the railroad in the evening, and that next morning they were found dead on or near the defendants' road, having broken through the *pagée*.

This evidence of itself is insufficient to maintain the action. The 39th section of the defendants' act of incorpora-

tion, 2 Will. IV, c. 58, provides that the said company shall, within six calendar months after any lands shall be taken for the use of the said railroad, divide and separate the land so taken from the lands adjoining thereto, &c.

Now there is the omission in the plaintiff's proof as to how long before the accident, the land had been taken by the defendants—but that was met by the fact that they had erected the fence there and the presumption would be that the fences was erected in time. It is proved that the *pagée*, and one of its pickets with its oaken connecting peg, were broken from the violence employed, the upper bar having been used as a fulcrum and thrown back to separate the two pickets, the near end of the bar being near the foot of the picket, and the far end seven feet within the plaintiff's property. It is also in evidence that the hay growing on defendants' railroad was a great temptation to the plaintiff's animals to stray, and that L'Heureux, her son-in-law, one of the witnesses, allowed them to stray on the defendants' road, which would of course save his own forage.

The evidence of the defendants, is precise and satisfactory as to the sufficiency of their fences and of the *pagée* in particular—moreover the 39th section of the act of incorporation above referred to required the defendants to make a sufficient fence for protection against *hogs, sheep and cattle*, and they were bound to do no more. Having done this, they fulfilled the requirements of the statute charter and could not be compelled to make a special construction for protection against vicious horses or even against horses at all; nor under those statutory requirements should the defendants be compelled to pay for the loss, not only of hogs, sheep or cattle, but of horses which she or her *employés* had taught to stray from her own alleged property upon that of the defendants. Moreover, by statute, horses are not cattle.(1)

MONDELET, Juge.—Je ne comprends pas comment, en

(1) Agricultural Act. Con. Stat. L. C., c. 26. secs. 5, 8.

regard d'une déclaration vague, comme l'est celle de la demanderesse, l'on a pu accorder des dommages à l'intimée, demanderesse, qui n'a pas pris la peine d'alléguer par qui et comment ses chevaux ont été tués. Il est, en même temps, fort singulier que la défenderesse n'ait pas fait débouter ou amender cette déclaration sur une défense en droit.

Quoiqu'il en soit " pour les causes mentionnées en la déclaration : " telle est la base du jugement. Quelles causes ?— Ces chevaux auraient pu s'introduire sur le chemin de fer, sans pour cela avoir été tués par les chars, bien qu'après avoir été tués, ils auraient pu être traînés et mutilés par les chars : D'ailleurs, les allégations ne justifient pas la preuve, que ces chevaux ont été tués par les chars, cette preuve était inadmissible.

Mais au mérite, il n'y a aucune preuve que les chevaux de la demanderesse ont été tués par les chars.

Quant aux clôtures, sept témoins ont, la veille, vu les clôtures de la compagnie. C'était leur affaire de les visiter et de les tenir en ordre. Tous les sept prouvent positivement qu'elles étaient en bon ordre, et que les pagées qu'ils ont vues, le lendemain matin de l'accident, n'ont pu être brisées qu'au moyen de beaucoup de violence et exprès. Ils prouvent aussi que les chevaux de la demanderesse ont été souvent vus sur le chemin de fer ; ils s'y rendaient par suite du mauvais état des clôtures de la demanderesse. Il appert aussi qu'un des chevaux de la demanderesse était un cheval vicieux qui défaisait les clôtures, et que ces clôtures ont été défaites par violence.

D'après ces raisons et d'autres faciles à suppléer, je pense que le jugement de la Cour de première instance est mal fondé.

Quant à la circonstance que les témoins de la défenderesse ont été réunis à leur bureau, afin qu'on sût ce qu'ils

connaissaient de l'affaire, il n'y a à cela rien de mal. C'était un acte de prudence qu'on ne peut blâmer, à moins qu'on ne prétende qu'on doit s'engager dans un procès, sans, au préalable, mesurer ses forces.

Je pense, au reste, que la demanderesse qui se sert de ses parents et, entr'autres, de son gendre, comme témoins, n'a pas bonne grâce à se plaindre de la compagnie qui fait entendre sept *section men*, les plus compétents, d'après leur connaissance personnelle, à prouver l'état des clôtures.

Le jugement de la Cour de première instance doit donc être infirmé, et l'action de la demanderesse déboutée, avec dépens dans les deux Cours.

La Cour:—Considérant qu'il n'est aucunement établi en cette cause, que les chevaux de l'intimée ont été tués par la faute ou négligence de l'appelante, défenderesse en Cour de première instance :

Considérant qu'il y a erreur dans le jugement dont est appel, savoir: le jugement rendu par la Cour Inférieure siégeant à Montréal, le 24 novembre, 1862, la Cour le casse, annule et met au néant.—Et cette Cour procédant à rendre le jugement que la Cour de première instance eût dû rendre, déboute la dite Désange Simard de son action, et la condamne à payer tous les dépens, tant dans la dite Cour de première instance que dans cette Cour.

Il est ordonné que le dossier soit remis à la Cour de première instance.

MACRAE, pour l'appelante.

CARTIER, POMINVILLE et BÉTOURNAY, pour l'intimée.

COUR DE CIRCUIT.—QUEBEC.

Présent :—STUART, Juge.

No. 595. { LAMBERT.....Demandeur,
vs.
BERGERON.....Défendeur.

Jugé :—1o. Qu'une motion pour suspendre la procédure, parce que le demandeur a fait défaut de payer les frais d'une première action qu'il a retirée, ne sera pas accordée.

2o. Qu'une pareille objection étant par le statut une fin de non recevoir, doit être présentée par un plaidoyer à l'action.

Held :—1o. That a motion to stay proceedings, because the plaintiff has failed to pay the costs on a former action which he has withdrawn, will not be granted.

2o. That an objection of this nature, being by statute a *fin de non recevoir*, must be taken advantage of by a plea to the action.

Jugement rendu le 23 février, 1864.

Le demandeur, *in formâ pauperis*, institua son action contre le défendeur pour une somme de £34. 13. 9. Le défendeur fit alors motion pour suspendre la procédure jusqu'à ce que le demandeur eût payé au défendeur la somme de £8. 15. 6, montant des frais encourus par le défendeur dans une première poursuite par le demandeur contre lui, le défendeur, et pour les mêmes causes que celles de la présente demande, laquelle première poursuite il avait été permis au demandeur de retirer en payant les frais encourus par le défendeur.

JOLY, pour le défendeur.—La présente motion est fondée sur la section 25 du Ch. 82, des Stat. Ref., B. C., conçue en ces termes :

“ La partie qui aura ainsi discontinué une cause, ou une poursuite quelconque, ne pourra pas la recommencer sans avoir payé les frais de la première.”

La manière, toujours adoptée pour se prévaloir de cette disposition de la loi, est par une motion telle que celle maintenant présentée à la Cour de la part du défendeur.

TOUSSIGNANT, pour le demandeur.—Répondit que la motion du défendeur n'était pas la procédure qu'il fallait adopter

pour prendre avantage de la clause du Statut cité par le défendeur, que le défendeur aurait dû plaider le défaut de paiement allégué dans sa motion par une exception.

STUART, Justice :—This case comes before the Court on a motion by the defendant to stay proceedings, inasmuch as the plaintiff has not paid to the defendant the costs on a former action brought on the same grounds as the present, and which action the plaintiff was permitted to withdraw on payment of costs to the defendant. The course now adopted by the defendant has been the course invariably followed before this Court for the last five and twenty years, and is much more convenient to the party in default than the proceeding in strict accordance with the law would be ; but, upon consulting with Judge Taschèreau, he thinks, and we have agreed, that where a party states that he has a question of fact to raise, either that the former action was not withdrawn or disposed of as alleged in the motion, or that the costs which he was bound to pay, have not been paid, then the motion to stay proceedings will not be allowed, and the party will be bound to proceed by regular pleadings, the objection is, by the Statute, made a *fin de non recevoir*, and under it, if pleaded, the action must be dismissed.

Judgement.—Take nothing by the motion, and the defendant permitted to file a plea to the action, containing the same grounds as those taken in his motion.

TALBOT et TOUSSIGNANT, pour le demandeur.

JOLY, pour le défendeur.

COUR DE CIRCUIT.—QUEBEC.

Présent :—STUART, Juge.

No. 1097. { VÉZINA Demandeur,
 vs.
 DENIS Défendeur,
 et
 DESCAREAU Opposante.

Jugé :—Que la seule clause d'exclusion de communauté dans un contrat de mariage, ne donne pas à une femme mariée les mêmes droits qu'une séparation de biens contractuelle ; et qu'une opposition afin de distraire faite par une femme sous de telles circonstances, ne peut avoir l'effet d'empêcher la vente de ses meubles saisis pour une dette contractée par son mari durant le mariage.

Held :—That the stipulation of exclusion of community in a marriage contract, does not give the wife the same rights as a *séparation de biens contractuelle* ; and that an opposition *afin de distraire* made by a woman under such circumstances cannot have the effect of preventing the sale of her moveable effects, seised for a debt contracted by the husband during the marriage.

Jugement rendu le 23 février, 1864.

Le demandeur, ayant obtenu jugement contre le défendeur, fit émaner contre lui une exécution *fieri facias de bonis*, en vertu de laquelle il saisit et arrêta tous les biens meubles qui se trouvaient chez le défendeur. A cette saisie, Sophie Descareau, l'épouse du défendeur, prenant la qualité de femme séparée de biens, produisit son opposition afin de distraire, alléguant que par son contrat de mariage avec le défendeur, fait et exécuté devant notaires, et dûment enregistré, il fut entr'autres clauses stipulé qu'il n'y aurait aucune communauté de biens entre elle et le défendeur, nonobstant la coutume de Paris, à quoi ils renoncèrent pour eux et leurs hoirs ; que la vache et les autres effets saisis par le demandeur, étaient et avaient toujours été la propriété d'elle, l'opposante, et n'avaient jamais été la propriété du défendeur.

Le demandeur contesta cette opposition pour les raisons suivantes : “ Parce qu'il n'est pas allégué que l'opposante “ est marchande publique, ni qu'elle soit séparée de biens “ d'avec son mari, soit contractuellement, soit judiciaire-

"ment." Puis, outre une dénégation, il plaida fraude et collusion.

GUILBAULT, pour l'opposante, après avoir suffisamment identifié les effets saisis, et prouvé qu'ils étaient la propriété de l'opposante, tant pour les avoir reçus par donation que pour les avoir acquis de ses propres deniers durant son mariage, maintient que l'opposition, sous de semblables circonstances, devait être maintenue.

TOUSSIGNANT, pour le demandeur.—Par la preuve qui a été faite, il n'y a peut-être qu'un léger doute que les effets saisis en cette cause soient la propriété de l'opposante ; mais, même en admettant son droit de propriété, l'opposante en cette cause n'est pas recevable à s'opposer à la vente des dits effets pour le paiement d'une dette contractée depuis son mariage.—Nous ne voyons pas par le contrat de mariage de l'opposante et du défendeur, qu'il y ait une séparation de biens contractuelle entre eux, mais simplement une exclusion de communauté ; or, il y a une grande différence dans l'effet de ces deux conventions. Je ne puis mieux appuyer mon opinion sur ce point, qu'en citant "Pothier, Traité de la Communauté," Nos. 462 et 464, où les effets différents que produisent les clauses de séparation contractuelle et d'exclusion de communauté, sont démontrés. Au No. 462, l'auteur établit d'une manière irréfutable que, quand il s'agit du seul cas d'exclusion de communauté, le mari a droit de percevoir à son profit tous les fruits, tant civils que naturels, qui naissent durant le mariage, pour se récompenser des charges du mariage qu'il supporte ; de même que lorsqu'il y a communauté, ces fruits appartiennent à la communauté, pour la dédommager des charges du mariage qui sont à la charge de la communauté. C'est pourquoi l'opposition doit être renvoyée avec dépens.

STUART, Justice.—The contract of marriage upon which the opposition in question in this cause is based, and under which it is sought to establish the right of the wife to the

property seized in her quality of *séparée de biens* with her husband, is defective in the object for which it appears to have been intended. This marriage contract contains an exclusion of community, but it would have been far more effective had it contained the stipulation mentioned in "Pothier, Traité de la Communauté," No. 464, *Que chacun des conjoints jouira séparément de ses biens. On appelle cette convention séparation contractuelle, elle a cet de plus que la simple exclusion de communauté, qu'elle prive le mari de la jouissance des biens de la femme.*

Jugement.—L'opposition est renvoyée avec dépens.

TALBOT et TOUSSIGNANT, pour le demandeur.

PLAMONDON et GUILBAULT, pour l'opposante.

SUPERIOR COURT.—QUEBEC.

Before :—TASCHEREAU, Justice.

No. 1309. { LEMESURIER, *et al.*, Plaintiffs,
vs.
LEAHY, *et al.*, Defendants.

Held :—That the appointment of a wife, as curatrix to her interdicted husband, necessarily contains the authorization to administer the estate of her husband as well as her own.

Jugé :—Que la nomination d'une femme, comme curatrice à son mari interdit, contient nécessairement l'autorisation d'administrer les biens de son mari aussi bien que les siens.

Judgment rendered the 10th March, 1864.

The plaintiffs, merchants trading at Quebec, brought suit against the defendants, John Leahy, Grocer, and Catherine Leahy, wife of Maurice Horan, as well in her own name as a *marchande publique*, as in her quality of curatrix to the said Maurice Horan, an interdicted lunatic, for \$323.43, the amount of a certain promissory note made by John Leahy in favor of Catherine Leahy, and by her endorsed and delivered to the plaintiffs, and for the costs of protesting the same.

The declaration of the plaintiffs set forth that Catherine

Leahy was, and had been for a long time previous to the interdiction of her husband, and with his consent and authority, carrying on business as a *marchande publique*, and still continued to carry on business as such, and as such had endorsed and delivered the promissory note in question to them, for and in consideration of matters appertaining to her commerce as a *marchande publique*, and in the course of her trade dealings with them as such, and that as such she had bound, both herself and Maurice Horan, her husband; that the defendants had often acknowledged to owe and promised to pay the amount demanded; and concluded that the defendants should be condemned, as well in their own names as in their qualities set forth in the action, *solidairement*, to pay to the plaintiffs the amount of the note, with costs of protest and suit.

Catherine Leahy, one of the defendants, in her quality of curatrix duly appointed to her interdicted husband, pleaded by *défense au fonds en droit* and perpetual peremptory exception, that since the interdiction of the said Maurice Horan, he could not legally give any consent or authority to her to act as a trader or *marchande publique*, and, consequently, that she could not bind or oblige the said Maurice Horan, or his estate; that she and the said Maurice Horan were married in Killarney, in the County of Kerry, in Ireland, and had no contract of marriage, and that by the law of Ireland, no community of property exists between persons so married, and that, in virtue of the premises, she could not exercise the calling of a *marchande publique*, and could, in no way, bind, oblige or render her said husband liable; that she had endorsed the promissory note in question, as an accommodation endorser, and without having received, as a *marchande publique*, or otherwise, any value whatever therefor, and that the said endorsation did not in any way arise out of her trade or commerce, or the gestion of the estate of the said Maurice Horan, her interdicted husband, but was wholly separate therefrom; of all which the plaintiffs, at the time of receiving the said note and endorsation, were well and fully cognizant.

TASCHEREAU, Juge.—Dans cette cause, le demandeur demande un jugement contre une femme qu'il allègue être marchande publique, et la question qui se présente est, " si cette femme *marchande publique* peut se lier elle-même, " et si comme marchande publique, curatrice de son mari, " (interdit pour cause de démence,) elle peut lier son dit mari." A l'article 136, Coutume de Paris, il est dit qu'une femme, marchande publique, se peut s'obliger sans son mari, touchant le fait et dépendance de la dite marchandise. Mais il est prétendu par la défense que, quoique marchande publique, cette femme ne peut seule ester en justice, qu'elle doit être autorisée à cet effet, ou par son mari, ou par le Juge. Cette objection de la part de la défenderesse devra disparaître si l'on consulte les articles 25 et 26 au Traité de la puissance du mari par Pothier, où il est dit, que lorsqu'un mari est tombé dans un état de démence, cet état, étant une infirmité qui peut lui être survenue sans sa faute, ne doit le priver d'aucun de ses droits, ni par conséquent du droit de puissance qu'il a sur sa femme ; la femme demeurant donc toujours sous puissance de mari, à défaut de l'autorisation que ce mari ne peut lui donner, elle doit avoir recours à celle du Juge qui en est représentative. Lorsque dans ce cas la femme est créée curatrice par le Juge, à la personne et aux biens de son mari, sa nomination à cette curatelle renferme nécessairement une autorisation pour administrer tant les biens de son mari que les siens, la femme n'a donc besoin d'aucune autre autorisation. Mais elle ne pourrait, sans une autorisation particulière du Juge, aliéner quelqu'un de ses héritages, ni faire aucun autre acte qui excéderait les bornes d'une administration. En conséquence, la femme doit être condamnée, mais pas en sa qualité de curatrice de son mari, qui, tombé en démence, ne pouvait pas autoriser sa femme, ni consentir que sa femme s'obligeât comme marchande publique.

L'action contre la femme dans sa qualité de curatrice de son mari doit donc être renvoyée.

Jugement :—La Cour &c. Considérant le billet promis-

soire mentionné en la déclaration des demandeurs, fait par le défendeur, John W. Leahy, à Québec, le vingt-six mai, 1862, pour la somme de \$320.96, payable à trois mois de date, à l'ordre de la dite Catherine Leahy, et par elle endossé : Considérant que les demandeurs ont prouvé leur demande contre le dit John W. Leahy, qui, comme faiseur du billet en question, pour bonne et valable considération, est responsable envers les demandeurs : Considérant que le fait que la défenderesse Catherine Leahy, non commune en biens avec son mari, Maurice Horan, a été nommée curatrice à son dit mari tombé en démence, comporte et renferme nécessairement une autorisation pour administrer tant les biens de son dit mari que les siens, et qu'elle n'a pas besoin d'autre autorisation pour ester en justice, et défendre à la présente action : Considérant d'ailleurs qu'elle est prouvée être marchande publique, et qu'elle pouvait comme telle se lier : Considérant que lors de la confection du dit billet, le dit Maurice Horan était depuis près de deux ans en démence et interdit : la Cour condamne les dits John W. Leahy et Catherine Leahy, conjointement et solidairement, à payer aux demandeurs la somme de \$323.46, avec intérêt, et les frais de la présente action, de plus, maintient la défense en droit et l'exception péremptoire en droit perpétuelle de la dite Catherine Leahy, es-nom et qualité, avec dépens, et renvoie l'action des demandeurs, quant à la dite Catherine Leahy, es-qualité de curatrice au dit Maurice Horan, avec dépens.

ANDREWS and ANDREWS, for plaintiffs.

ALLEYN and ALLEYN, for defendants.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE.

Before :—DUVAL, Chief-Justice, MEREDITH, MONDELET and
 BADOLEY, Justices.

AYLWIN.....Appellant,
 and
 JUDAH.....Respondent.

Held.—1o. That in an hypothecary action brought by a plaintiff, *cessionnaire* of a debt, the signification of the action on the defendant, *tiers détenteur*, cannot be held as a signification of the transfer to the principal debtor.

2o. That where a plaintiff brings his action as upon a debt due and payable, and it appears from the *titres de créances* produced by himself that the debt is not due, (*exigible*) the action cannot be maintained.

3o. That by the jurisprudence of Lower Canada, the *cessionnaire* of a debt may maintain an action against the debtor without a previous signification to him of the acts of transfer.

Jugé.—1a. Que dans une action hypothécaire portée par un demandeur, *cessionnaire* d'une dette, la signification de l'action au défendeur, *tiers détenteur*, ne peut être considérée comme signification du transport au débiteur principal.

2o. Que lorsqu'un demandeur porte son action comme sur une dette due et exigible, et il appert des titres de créances produits par lui-même que la dette n'est pas exigible, l'action ne pourra être maintenue.

3o. Que par la jurisprudence du Bas-Canada, le *cessionnaire* d'une dette peut porter son action contre le débiteur sans signification préalable de l'acte de transport.

Judgment rendered the 9th March, 1864.

The judgment appealed from was rendered in the Superior Court, Montreal, on the 28th February, 1857, (Smith, Mondelet and Chabot, Justices.) (1)

The action was an hypothecary action brought against the respondent by the appellant, the debt being based on a Notarial obligation of the 23rd November, 1840, for £1000, consented to by the Honorable Jean Roch Rolland, in favor of the Honorable Samuel Gale, registered in December, 1843, under which a general *hypothèque* was created. This obligation was transferred to one Rowand, by *acte* of transfer of the 21st November, 1850, and was ceded by Rowand to William Aylwin, by transfer of the 19th August, 1852, to both of which transfers the debtor was a party, acknowledging himself duly notified. On the 19th No-

(1) 7 L. C. Reports, p. 122.

vember, 1855, William Aylwin transferred the debt in question to the plaintiff, and the action was brought in September, 1856.

The deed of sale to the respondent of the property hypothecated bore date the 6th November, 1852, and contained a clause mentioning a *rente* as due to the Ladies of the Hôtel Dieu, adding: "déclarent de plus la propriété pré-sentement vendue franche et quitte de toutes autres charges et hypothèques."

An action *en garantie* was brought by the respondent, against his vendor, Rolland, but no plea was filed on behalf of the principal defendant, nor of the defendant *en garantie* :

The judgment of the Superior Court was based upon a clause in a notarial *acte* appended to the transfer to Wm. Aylwin, of 19 August, 1852, by which Wm. Aylwin, acting by the appellant, as his attorney, gave delay of payment to the defendant *en garantie* for ten years. In consequence of the delay so given, the Court dismissed the principal action with costs, the judgment further declaring, "that inasmuch as the plaintiff hath failed to establish by law any right to the conclusions taken by his declaration, as this Court cannot now adjudicate upon the said action *en garantie*, the Court condemns the said plaintiff, *demandeur principal*, to pay the costs thereof."

DUVAL, Chief-Justice :—Stated in effect that this was an hypothecary action based on a debt transferred to the plaintiff, but without signification of the transfer to the principal debtor. Is a signification by the institution and service of an action sufficient in such a case, even as against the debtor himself? It was maintained by the best writers that a signification of the assignment should precede the institution of an action. A different jurisprudence had been established in Lower-Canada, under which the service of the action is held as a sufficient signification to the debtor. But, in this case, the defendant was not the personal

debtor, but a *tiers détenteur*, and there was no signification to the principal debtor. The judgment below dismissing the action of the principal plaintiff with costs was a correct judgment, but there was error (probably arising from oversight) in condemning the original plaintiff to the costs of the action *en garantie*, and except as to these latter costs, the judgment would be confirmed.

MEREDITH, Justice :—Stated that it was a doubtful point whether as against the original debtor a signification of transfer could be held as validly made by action. He was a member of the Court, which held in the case of *Martin vs. Côté*, (1) that signification of a transfer previous to the action was not necessary, and that the signification of the action was sufficient. But this judgment was founded upon the jurisprudence adopted by the Courts in the districts of Quebec and Montreal, rather than upon authority. In *Paré vs. Déruselle* (2) he had concurred in a judgment by which it was held, that without previous signification of the transfer, no costs would be awarded to the plaintiff, and that the plaintiff would be condemned to pay costs where the defendant tendered the monies due into Court.

In the present case, the defendant was a *tiers détenteur*, and signification of an hypothecary action could not be held as a signification to the debtor.

It had been urged that partial payments by the debtor shewed a knowledge of the transfer, and were equivalent to a signification. This was true as against the original debtor ; but not where a third party was concerned. As to the ground taken, that delay or *terme* of payment must in all cases be invoked by a defendant, and ought not in this case to have been supplied by the Court below, there was no doubt that ordinarily it was for the defendant to allege and prove that he had term of payment. But if the plaintiff,

(1) 1 L. C. Rep., p. 239.

(2) 6 L. C. Rep., p. 411.

- making out his own case in proof, shewed that a delay had been given, he could not expect to obtain judgment until the term had expired.

If the proof of the plaintiff was complete, and shewed on its face a debt that was due and payable, then the defendant must invoke and prove the delay of payment.

In the present case, the notarial *actes* produced by the plaintiff shewed that delay of 10 years had been given.

These *actes* formed a link in the chain of the plaintiff's proof, and shewed that instead of a promise to pay, as alleged, there had been a different promise, a promise to pay after ten years. So in England it was held that when there are exceptions in the enacting clause of a statute, the plaintiff must allege and shew that the case did not fall within any of the exceptions; but if the exceptions were founded on a different statute, or on a different clause of the same statute, then the defendant must allege and prove them as matter of defence.

This rule he held applicable to the present case, Courts must decide *secundum allegata et probata*, and if a plaintiff comes and says, the debt is due now, and by his evidence proves it will only be due in ten years, his action cannot be maintained :

Judgment :—Considering that in the judgment pronounced on the 28th February, 1857, by the Superior Court, sitting at Montreal, dismissing the action of the appellant, plaintiff in the said Court, against the said defendant, with costs as well of the principal action as of the action *en garantie*, in favor of the said respondent against the said appellant, there is no error, save and except in that part of the said judgment which condemns the appellant to pay the costs incurred on the action *en-garantie*, this Court doth confirm the judgment pronounced by the Superior Court, save and except that part which condemns the said appellant to pay .

the costs of the action *en garantie*, which part of the said judgment is hereby reversed, annulled and set aside.

And this Court doth order that each party do pay the costs by him incurred in the present appeal.

STUART, H., for appellant.

JUDAH, T. S., for respondent.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
EN APPEL.

Présents :—DUVAL, Juge-en-Chief, MEREDITH, MONDELET
et BADGLEY, Juges.

DAUKIGER..... *Appellant*,

et

RITCHIE, *et uxor*..... *Intimés*.

Jugé :—1^o. Que, dans l'espèce, une femme ne peut être tenue responsable, après la décès de son mari, d'un billet qu'elle a consenti sans son autorisation, et sans preuve que la séparation de corps et de biens obtenue contre lui eût été exécutée.

2^o. Qu'elle ne peut être non plus tenue au paiement d'un compte de marchandises reçues dans les mêmes circonstances, et en l'absence de preuve que telles marchandises étaient nécessaires pour son entretien.

Held :—1^o. That, in the case submitted, a woman will not be held responsible, after the death of her husband, for a note made by her without his authority, and without proof that the *séparation de corps et de biens* obtained by her had been executed.

2^o. That, likewise, she cannot be made to pay for merchandises purchased under similar circumstances, and in the absence of proof that the effects were necessary for her maintenance.

Jugement rendu le 9 mars, 1864.

Cette action avait été instituée devant la Cour Supérieure pour le district de Montréal, pour le recouvrement de la somme de six cent onze dollars et onze cents, argent courant de cette province, que l'appellant prétendait lui être due par les intimés en vertu de deux billets promissoires, et d'un compte pour marchandises vendues et livrées. Les billets en question étaient respectivement conçus comme suit :

Montreal, April 12th, 1860.

On demand, for value received, I promise to pay to the order of myself, at the Bank of Montreal, the sum of three hundred and thirty six dollars $1\frac{3}{4}$ ¢, with interest.

MARGUERITE LABELLE.

Montreal, April 23, 1861.

On demand, for value received, I promise to pay to the order of myself, at the Bank of Montreal, in Montreal, the sum of one hundred and fifty dollars ninety six cents, with interest.

MARGUERITE LABELLE.

Ces deux billets avaient été endossés par la dite Marguerite Labelle et remis à l'appelant qui, dans sa déclaration, alléguait :

Que la dite Marguerite Labelle était veuve, en premières noces, de Patrick Foley, en son vivant de Montréal, gentilhomme, de qui elle était séparée quant aux biens.

Que le dix-sept août, mil huit cent soixante-deux, la dite Marguerite Labelle avait convolé en secondes noces avec James Henry Ritchie, l'un des intimés, dans l'Etat de New-York, l'un des Etats-Unis d'Amérique, mais avec l'intention de revenir à Montréal pour y demeurer avec son dit époux ; que de fait, les intimés étaient revenus à Montréal et y demeuraient.

Qu'il n'y avait pas eu de contrat de mariage entre les intimés, et que par conséquent, il y avait communauté de biens entre eux.

Qu'avant de convoler ainsi en secondes noces, la dite Marguerite Labelle était marchande publique, et était endettée, en cette qualité, envers l'appelant en une somme de \$611 $1\frac{3}{4}$ ¢ pour le montant des billets ci-dessus mentionnés, y compris l'intérêt accru sur iceux, et pour balance d'un compte de marchandises vendues et livrées, au montant de \$45 $1\frac{3}{4}$ ¢ ; laquelle somme l'appelant avait droit d'exiger et recevoir des intimés comme étant communs en biens.

Cette action fut rapportée en la Cour Supérieure pour le district de Montréal le huit avril, mil huit cent soixante-et-trois.

Les intimés plaidèrent par exception que la dite Marguerite Labelle n'avait jamais été marchande publique, et ne l'était pas aux dates des billets et du compte en question ; qu'à toutes ces époques, la dite Marguerite Labelle était sous puissance de mari, savoir, le dit Patrick Foley, son époux ; que celui-ci ne l'avait jamais autorisée à souscrire les dits billets ou à acheter les dites marchandises ; qu'elle n'avait contracté aucun engagement valable et légal envers le dit appelant, et que, par conséquent, les défendeurs, intimés, ne devaient rien au demandeur, appelant. Les intimés opposèrent encore à l'action de l'appelant une défense au fonds en fait.

Il fut dit par l'intimé que l'appelant avait failli de prouver que la dite Marguerite Labelle avait été marchande publique, et qu'elle l'était aux époques indiquées en sa déclaration ; et que l'appelant n'avait pas prouvé non plus que la dite Marguerite Labelle eût été séparée de biens du dit Patrick Foley, son premier mari. Le jugement prononçait la séparation, mais l'appelant n'avait pas prouvé, et rien dans le dossier ne faisait voir, que ce jugement eût été suivi d'exécution.

Les intimés ne firent point d'enquête et se bornèrent à produire une admission de l'appelant qu'aux dates des dits billets et de la fourniture des marchandises, le dit Patrick Foley, premier mari de la dite Marguerite Labelle, était vivant. La cause était en cet état lorsqu'elle fut inscrite et plaidée ; M. le Juge assistant Monk rendit le jugement suivant :

“ The Court &c. Considering that the plaintiff hath not
 “ established in evidence the allegations of his declaration
 “ in this cause filed, and more particularly that the said
 “ defendant, Marguerite Labelle, was legally liable and
 “ indebted to the plaintiff, as by him alleged in his said

"déclaration, doth dismiss the action of the plaintiff, with costs."

DUVAL, Chief-Justice :—Stated in effect that the action was on a note, the defendant being the second husband of the woman who made it. The plea was that she was not authorized to make the note. It would appear that the first husband went away to the United States and died there, and that the goods were obtained long after the husband left. By law the authorization of the husband is absolutely necessary. It is incorrect to assimilate the wife not authorized to the minor who contracts. Pothier in his *Treatise of the puissance maritale* shews the cases are not similar. If the wife goes to the baker or butcher, the husband is surely as much bound, as if a servant had gone. But the difficulty here, was that the consideration of the note is not proved. We cannot say whether under the circumstances, the articles were or were not necessities. In addition to this, the judgment of *séparation de biens*, from her first husband, was not executed. The judgment, therefore, must be confirmed.

MONDELET, Juge.—Le jugement dont est appel, est, à mon avis, d'une parfaite exactitude. Il n'y a aucune preuve que cette femme fût marchande publique, séparée *légalement* de biens de son mari, et qu'elle eût la moindre autorité de s'obliger.

Indépendamment de ces raisons, il suffit de jeter un coup-d'œil sur le compte dont l'appelant réclame la balance. Les effets vendus sont évidemment de la sorte qu'une femme vivant de prostitution, comme il paraît qu'elle le faisait, est dans le cas d'acheter.

J'approuve le jugement, sous tous les rapports, et je n'hésite aucunement à dire qu'il doit être confirmé.

Jugement confirmé.

LEBLANC et CASSIDY, pour l'appelant.

DOUTRE et D'Aoust, pour les intimés.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE,

Before :— DUVAL, Chief-Justice, MEREDITH, MONDELET
 and BADOLEY, Justices.

HEUGH, *et al.*, *Appellants*,

and

ROSS, *et al.*, *Respondents*.

Held:—That in the case of an affidavit to obtain a *saisie-arrest* before judgment, the prothonotary must state in the *jurat* that the affidavit was sworn to *before* him.

Jugé:—Que dans le cas d'un affidavit pour obtenir une *saisie-arrest* avant jugement, le prothonotaire dans son certificat d'affirmation doit déclarer que le serment a été prêté *deyant* lui.

Judgment rendered on the 9th March, 1864.

MONDELET, Justice:—The sole question is whether the *Jurat* to an affidavit to obtain a *capias ad respondendum* is sufficient.—It is in the following words :

“ Sworn and acknowledged at Montreal, this 28th day of October, 1862.

MONK, COFFIN & PAPINEAU, P. S. C.”

On the one hand, the Court may and should presume that what was done by its officers, was well done. But, on the other hand, should it not appear that the act in question was done *before* or by them? Is it sufficient for them to attest that the party was sworn, without certifying it was before them? Supposing the party was sworn, in chambers, before a Judge who omitted signing, and that there was not a minute to be lost, the Judge having left chambers, the prothonotaries had certified, as they did, and do when in open Court, the *Jurat* would be strictly true, but incomplete and insufficient.

Now, upon a prosecution on an indictment for perjury, some 5 or 6 or 10 years after the date of the *Jurat*, how

could the prothonotaries, or any of them, assume the responsibility of swearing in the witness box, that on such a day, such a party was sworn before them? With the words "before us," I understand they could assist their memory, and, from those words, confidently presume that such was the case. But when no such words are to be found, and their memory fails them, a guilty party might escape, and public justice be defeated.

I think that the *Jurat* is insufficient, and that the judgment of the Court below, quashing the *capias*, is correct, and should be confirmed.

BADGLEY, Justice :—The difficulty arises from an alleged omission in the *Jurat* of the affidavit taken by the prothonotary of the Superior Court, for the issue of the attachment in this cause. The omission complained of is the want of the words, *before us*, above the signature of the officers. The affidavit was taken by the prothonotary under the authority of the 46th section of the Consolidated Statute of Lower Canada, cap. 83, which enacts that no process of attachment shall issue except there be proof on oath made *before a Judge of the Superior Court, or before the prothonotary of the Superior Court, or before a clerk of the Circuit Court*. This section gives authority to the prothonotary or clerk aforesaid, which neither had otherwise, to take the affidavit required in such case; to that extent only has a statutory change in the law been made, and the affidavit being duly taken before either officer the writ issues of course. In the same manner, under the 53d section, a commissioner to take affidavits, &c., having first previously received before him the oath or affidavit required to be made, may issue his warrant &c. In all this, there is really no more judicial power given to the prothonotary or clerk, than to the commissioner, and the taking of the affidavit, whether by the prothonotary, clerk or commissioner, is merely ministerial, and thereupon the attachment issues of course.

Our affidavit has been borrowed from english precedent,

and the rulings upon the question which prevail in England may be safely adopted as our legal guide here.

Now to the affidavit itself there are two persons, the one who swears to the contents, and the other the Judge, officer or commissioner before whom it is taken. The act of the receiver of the affidavit is a very important part of it, and should be perfect in shewing both the jurisdiction of the party administering the oath, and also in certifying *that it had been administered before him*. As regards himself, the knowledge of his jurisdiction is personal or self contained, as regards others, that knowledge can only be communicated in the certificate which he gives officially of the affidavit having been taken before him, by the authentication under his official signature, shewing that the oath or affidavit was so taken before him. In 1 New Sessions Cases, p. 370, *Regina vs. Inhabitants of Bloxham*, Mr. Justice Coleridge held: "That the omission was not an irregularity simply, but "went clearly to the jurisdiction of the commissioner, being "of the very essence of the swearing:" and Mr. Justice Wightman said: "Affidavits must be sworn before a person "authorized to take them, the jurisdiction must appear on "the face of the affidavit." In 2 New Sessions Cases, p. 346, *Regina vs. Inhabitants of Woking*, it was held, "that "the *Jurat* without the words 'before me' was bad." Indeed an affidavit without these words in no way indicates its having been actually taken before the officer.

In England this preciseness is not required in affidavits taken before Judges. It is usual to uphold affidavits signed by Judges there without those words, because by the common law, Judges are always considered *in curia*, and as acting in this respect judicially; no statutory authority is required by them to receive or take affidavits, and the Chief Baron, in 13 Mees. and Wels., p. 519, said: "Although in the case of an affidavit sworn before a commissioner, the omission of the words *before me* may be objectionable, we think it is not so here; this form of jurat has been invariably used, and we are unwilling to question its validity," and Baron

Parke said : "The form of this jurat is in conformity with the invariable practice. In that case the jurat was sworn at my chambers, &c."

The common law has attributed to the Judges in England, as our law does here to our Judges, power and jurisdiction in legal proceedings to take affidavits independent of statutory authority, and the practice of the Courts has recognized their official signatures as assurances that those legal documents were taken before them.

Apart from the Judges, no person or officer has legal authority to take affidavit and to administer oaths in civil matters, except by statute, and therefore prothonotaries, clerks of Courts and commissioners appointed to take affidavits are in the same category by law. In these officers the duty in this respect is not a judicial office, the Court practice which recognizes the Judge's signature does not extend to them, and when they shall have administered the oath, it is essential that their delegated jurisdiction should be shewn expressly in their *Jurat*, under their official signature, to have been exercised before them.

It was observed in England in one of the cases in this connection, as follows : "Now there is no rule more wholesome and proper than that the *Jurat* of an officer should state that which is essential to its validity, namely : that the affidavit was taken before a party who had proper authority to administer the oath and did do so ; without these there is a defect of jurisdiction, &c."

It has been observed that the power to take the affidavit given to the prothonotary is not judicial, and in taking it he is no more assimilated to the Judge, than the commissioner who is empowered not only to take the affidavit but also himself to issue the warrant of attachment, and yet in the case of the latter, his omission in this respect would unquestionably be fatal to the affidavit: why not equally so in the case of the prothonotary ?

The necessity of having substantially in affidavits not

taken before the Judges of the land, that they were taken before the proper authority has been settled in England. The signature of the Judge to the *Jurat* is conclusive there by the practice of the Courts, but the current of authorities does not equally recognize the signature of other delegated officials to affidavits, or sufficient to conclude the fact that they were taken before them unless by their *Jurat* they certify the fact. *It is not alone the perjury of the person making the affidavit* that is to be considered, but also, *the misfeasance of the official delegate certifying to what might have been done by himself.*

The appellants in their factum have laboured to shew a Court practice here contrary to the necessity of using the words in question, but their legal statistics are clearly against themselves. They have given the following :

Total number of depositions examined in 28 causes in 1862 and 1863, taken at random, in which the words "before us" or "before me," were not found.....	286
Total with the words "before us" in 1862....	27
" " " " in 1863....	34
	— 61
Total with words "before us" struck out in 1862.	19
" " " " in 1863.	4
	— 23
	— 84

Out of twenty affidavits for *Capias* and attachment before judgment, all sworn before the prothonotary of the Court, the following was the result :

Number with the word "before us" in <i>Jurat</i>	11
Number with the words "before me" in <i>Jurat</i>	5
Number without either the words "before us" or before me"	4
	— 20

Now the depositions above referred to cannot be taken

into account at all, in this controversy, because they are all taken or presumed to be taken in open Court, in the presence of the Judge, and as a portion of the judicial proceedings in the record of the pending cause, therefore, as regards them, the practice of the Courts has invariably sustained them as judicial proceedings, and in conformity with invariable practice, independent of the addition or omission of the words *before us*.

But the affidavits above referred to are more legitimate examples in the controversy, and yet of the above number of 20 given, sixteen had the words *before me* or *before us* inserted, and only four were without them: as mere practice cases, therefore, the figures are strongly against the pretensions of the appellants, as 4-5th to 1-5th. The appeal therefore under all these circumstances should not be maintained.

The judgment of the Superior Court was rendered as follows:

" The Court, &c., upon the motion of the defendants of
 " the 17th November, instant, that for the reasons set forth
 " in said motion, the writ of attachment, *saisie-arrest*, in this
 " cause issued, and the seizure and attachment made there-
 " under, and all proceedings of the Sheriff or his bailiff
 " under such writ, or in respect of such seizure and attach-
 " ment be quashed, set aside, and declared null and void,
 " with costs, having examined the proceedings, and the
 " affidavit filed in the said cause for the obtaining of the
 " writ of *saisie-arrest* issued in this cause, and deliberated,
 " doth grant the said motion, with costs, in consequence
 " doth quash, set aside, vacate and declare null and void
 " the said writ of attachment, *saisie-arrest*, in this cause
 " issued, and the seizure and attachment made thereunder,
 " and all proceedings of the sheriff or his bailiff under such
 " writ, or in respect of such seizure and attachment."

Judgment confirmed, MEREDITH, Justice, *dissentiente*.

ROBERTSON, A. & W., for appellants *ex parte*.

CIRCUIT COURT.—MONTREAL.

Before :—LORANGER, Justice.

No. 1263. { BARRETTE..... Plaintiff,
vs.
BERNARD..... Defendant.

Held :—1o. That the fine of \$200 imposed by the Consol. Stat. of Canada, chap. 6, sect. 60, for falsely assuming to vote in the name of a person whose name appears on the list of voters cannot be recovered in a Court of Civil Jurisdiction.

2o. That the offence is made a misdemeanour, and can be tried only in a Criminal Court, and the fine imposed, on conviction, in such Court.

Jugé :—1o. Que l'amende imposée par le Stat. Ref. du Canada, chap. 6, sec. 60, pour avoir fausement voté au nom d'une personne dont le nom figure sur la liste des électeurs, ne peut être recouvrée dans une Cour de Jurisdiction Civile.

2o. Que l'offense est constituée un délit, et ne peut être poursuivie que devant une Cour Criminelle, et l'amende imposée, sur conviction, par telle Cour.

Judgment rendered the 30th March, 1864.

The action was brought against Hercule Bernard, advocate.—The declaration set forth that at an election for the Electoral Division of Montreal East, held in June, 1863, for the election of a member of the Provincial Parliament, the defendant falsely and knowingly voted for the Hon. G. E. Cartier, in the St. Louis Ward, in the City, in the name of J. Bte. Bernard, whose name was inscribed on the List of voters as "J.-Bte. Bernard, Gent. 44 Vitre St.," and had thereby become guilty of a misdemeanor punishable by fine, not exceeding \$200, payable *sous contrainte par corps*.

Conclusions for condemnation for \$200, and, in default of payment within a fixed delay, for imprisonment until payment be made.

The defendant pleaded, 1o. That he voted as a duly qualified elector, and was a legal voter: 2o. *défense au fonds en fait*.

The clauses of the statute under which the action was brought were the 60th and 87th sections of Consol. Stat. of Canada, chap. 6, which are in the following terms :

Sect. 60. "If at the Election of a Member to serve in the

Legislative Council or Assembly, any person knowingly personates and falsely assumes to vote in the name of any other person whose name appears on the proper list of voters, whether such person be then living or dead, or if the name of the said other person be the name of a fictitious person, every such person shall be guilty of a misdemeanour, and on being convicted thereof, shall be liable to a fine not exceeding two hundred dollars, or to be imprisoned for a term not exceeding six months, or both, at the discretion of the Court."

Sect. 87. "All penalties imposed by this Act, shall be recoverable, with full costs of suit, by any person who will sue for the same by action of debt or information, in any of Her Majesty's Courts in this Province having competent jurisdiction, &c.

LORANGER, Justice.—Said that the action could not be maintained in any Civil Court; that the offence charged was a misdemeanour and the defendant was liable to trial in a criminal Court, and, on conviction, to a fine not exceeding \$200. It was true this had not been pleaded, but the Court must notice it, as a matter of jurisdiction.

Judgment dismissing action.

DOUTRE and **D'Aoust**, for plaintiff.

DESROCHERS and **QUIMET**, for defendant.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
 APPEAL SIDE.

Before :—DUVAL, Chief-Justice, MFREDITH, MONDELET and
 BADGLEY, Justices.

THE MAYOR, ALDERMEN AND CITIZENS OF THE

CITY OF MONTREAL..... *Appellants,*

and

MITCHELL *et al.*, *Respondents.*

Held :—1o. That the Corporation of the City of Montreal is liable for damage caused to goods stored in a cellar forming part of the premises leased to the plaintiffs, in consequence of the choking of a shaft in one of the public drains under the charge of the Corporation, thereby causing the water to flow back into the cellar through the private drain.

2o. That the cost of hiring other storage for the goods, will be included in the damage awarded, and is not a damage too remote to be recovered.

Jugé :—1o. Que la Corporation de la Cité de Montréal, est responsable pour dommage causé à des effets emmagasinés dans une cave formant partie de lieux loués aux demandeurs, en conséquence de l'engorgement d'un puit dans un des canaux publics aux soins de la Corporation, les eaux, en conséquence, refluant dans la cave par le canal privé.

2o. Que les frais de louage d'autres lieux pour l'emmagasinage des effets, seront inclus dans les dommages accordés, ces dommages n'étant pas le résultat d'une cause trop éloignée.

Judgment rendered the 9th March, 1864.

The declaration set forth that the respondents were lessees and occupants of a store in Water Street, in the City of Montreal; that the street drains in the street and the shaft running into the same, had been made by, and were under the jurisdiction of, the Corporation, which was bound to keep them in order and repair; that the respondents were taxed and paid assessments for that and other purposes, and that the Corporation was bound to keep the drains and shaft free from obstructions, and to prevent water and other filth from flowing backward into the premises of the respondents. It then set up the storing of sugar in the cellar, and that owing to the negligence of the appellants, on or about the first or second of October, 1855, water flowed into the cellar from the drain and damaged the sugar to the extent of £547 7 8, currency; that a survey was held upon the sugar and the same was sold for £258.

8. 2, after deduction of the expenses £5. 6. 9, the previous value of the sugar having been £805. 12. 11.

The respondents also claimed a sum of £100, for expenses incurred by them in storing their goods elsewhere, in consequence of having lost the use of the cellar.

The plea denied the allegations of the respondents, or that they, the appellants, had caused the damage, and declared that at the said time the drains belonging to the Corporation were in good order, and that if the respondents suffered damage it was not the fault of the appellants, but their own fault or that of the proprietors of the store, owing to the bad order of the private drains.

The parties went to proof and the following judgment was rendered by the Superior Court.

MONTREAL, Justice.—The Court, &c. Considering that it is established by the evidence adduced that the loss and damage sustained by the plaintiffs, and mentioned and complained of in the declaration and demand in this cause made and filed, resulted from the obstruction in the shafts and drain of the defendants, in Common or Water Street of the City of Montreal, as alleged in the plaintiffs' declaration : Considering that the said loss and damage so complained of was caused by the neglect and default of the said defendants, and not by reason of any default, neglect or omission of the said plaintiffs : Seeing that the plaintiffs have proved the material allegations of their said declaration, doth adjudge and condemn the said defendants to pay and satisfy to the said plaintiffs, 1st the sum of £547. 7. 8d, current money of the Province of Canada, for loss and damage to the sugar of plaintiffs, mentioned in their said declaration ; and the sum of £68. 15. 2, for storage and rent of other stores which the plaintiffs were obliged to pay in consequence of the flooding and inundation of their cellars, as stated in their declaration, the said two sums making together £616. 2. 10, said currency, with

interest on said sum of £616. 2. 10, from this day¹ until actual payment, and costs.

STUART, for the appellants, contended :

1o. That the Corporation was not liable to indemnify parties for any damage caused by the reflux of water in their drains entering into private drains.

2o. That the respondents were guilty of gross negligence and want of care in laying their private drain and connecting it with that of the appellants, and consequently under no circumstances could be entitled to damages from them.

TORRANCE, for respondents, urged :

1o. That the damage in question resulted from a reflux of water arising from the choking and improper construction of a shaft belonging to the appellants. They were liable for their negligence, and ought to reimburse the respondents in the loss they sustained, and which was directly traceable to the tort and negligence of the appellants.

2o. That the legal responsibility of the Corporation for the injury sustained, was beyond question. In England, an action on the case would lie against a Corporation for a neglect of a corporate duty, as for not repairing a creek which they were bound to do. (1)

3o. That in our own jurisdiction, in similar circumstances, the Corporation of Montreal had been condemned to pay such damages, and had admitted the liability by submitting to the condemnation. (2)

4o. That in Upper Canada, in a somewhat similar action, the Corporation of Toronto was held liable for damages caused by water and filth flowing into a cellar, owing to the improper construction of the drain leading into the main sewer, *Reeves vs. Corporation of the City of Toronto*, 8 U. C. Law Journal, p. 35.

(1) *Angell on Corporations*, §382.

(2) *Kingan et al., vs. The Mayor, &c.*, 2 L. C. Jurist, 78 :—*Walsh vs. The Mayor et al.*, 5 L. C. Jurist, p. 335 :—*Beliveau vs. Corporation*, 6 L. C. Reports, 487.

BADGLEY, Justice.—Recapitulated the pleadings and evidence, and held, that the damage was evidently caused by the choking of the shaft in the street near the respondents' premises; that the water finding no outlet, naturally flowed back and entered the cellars of the stores, causing thereby the damage complained of. This damage was not too remote.

It was the immediate and natural consequence of the choking.

MEREDITH, Justice.—Said that a citizen had a right to connect his private drain with the Corporation drains, at the most convenient point. He could be compelled to carry the connexion to a distance where it would be beyond all possibility of obstruction. He considered that in this case the respondents' drain was proved not to have joined to the Corporation drain in the best manner, if projected too far into the Corporation drain. But this could not have caused the damage complained of. It could only have obstructed the water flowing past it, and getting to the shaft, whereas it was evident that the water had passed the point connecting the two drains and had reached the shaft, and finding no passage there, had flowed back into the respondents' cellar. The respondents had a right to act on the supposition that the drains of the Corporation were good and sufficient drains; the proof established their defects, and the judgment below must be confirmed.

STUART, H., for appellants.

TORRANCE and MORRIS, for respondents.

CIRCUIT COURT.—MONTREAL.

Before :—LORANGER, Justice.

No. 7093. { LAYOIE..... Plaintiff,
 vs.
 { HOTTE, et al., Defendants.

Held.—10. That under "The Lower Canada Consolidated Municipal Act," a winter road was validly traced out and made across the plaintiff's lands without his consent, his fence, which was of stone laid up without mortar, being held to be a fence which could "without great difficulty or expence be removed or replaced."

20. That an action of damages against the Inspector for so laying out the road, and against another who assisted in removing the fence, must, therefore, be dismissed.

Jugé :—10. Qu'en vertu de "L'Acte Municipal Refondu du Bas-Canada," un chemin d'hiver avait été valablement tracé et fait sur les terrains du demandeur sans son consentement, sa clôture, qui était de pierres sans mortier, étant réputée être une clôture qui pouvait "être abattue ou remplacée sans beaucoup de difficultés ou de grandes dépenses."

20. Qu'une action en dommage contre l'inspecteur pour avoir tracé ce chemin, et contre un autre pour avoir assisté au déplacement de la clôture doit, par conséquent, être renvoyée.

Judgment rendered the 30th March, 1864.

This was an action brought against the defendants to recover damages caused by their having traced a winter road over the plaintiff's farm in St. Martin, and removed his fences. The defendants pleaded that one of the defendants, Hotte, was Inspector of roads for the municipality of St. Martin, and acted under his directions, and that the winter road was laid out across the plaintiff's lands in the place where it was ordinarily traced, and that the plaintiff's fences could without great difficulty and expence be removed and replaced.

LORANGER, Justice.—Referred to the section of the law under which winter roads were laid out, Consol. Stat. of Lower-Canada, chap. 24, sect. 42, sub-sects. 2 and 3.

" 2. Winter roads shall be laid out in such places as the
 " Inspectors shall from time to time determine."

" 3. They may be laid out, and carried through any field,
 " or any inclosed ground, except such as are used as or-
 " chards, gardens or yards or are fenced with quick hedges,

“or with fences which cannot without great difficulty or
 “expence be removed or replaced, through which they
 “shall not be carried, without the consent of the occupant.”

LORANGER, Justice.—The evidence in the cause shewed that the plaintiff's fences could be, and that they were removed, without much difficulty or expence. The fence was a wall of rough stones laid up without mortar. It had been said that in a case decided by another Judge it was held that the road could not legally be traced or made across the same fence. (1) He could only decide from the evidence as given in the case before him, but it did not appear that in the former case the defendant was Inspector of roads, which was a point of importance. Here, Hotte was the servant of the municipality, acting in virtue of orders given him, and the other defendant was legally carrying out the instructions of the officer. The action must therefore be dismissed.

GIROUARD, for plaintiff.

CARTIER, POMINVILLE and BÉTOURNAY, for defendants.

CIRCUIT COURT.—MONTREAL.

Before :—LORANGER, Justice.

No. 1653. { GAUTHIER..... Plaintiff,
 vs.
 { GRATTON..... Defendant.

Held :—That where a defendant was sued for a *prix de vente* of a land situated in the district in which the action was commenced, and service was made upon the defendant at his domicile, within another district, in which also the deed of sale was passed; the Court has no jurisdiction, the cause of action having arisen in another district.

Jugé :—Que dans le cas d'un défendeur poursuivi pour le prix de vente d'une terre située dans le district où l'action a été commencée, et la signification faite au défendeur dans un autre district, où il avait son domicile, et dans lequel l'acte de vente avait été exécuté; la Cour n'a pas juridiction, la cause d'action ayant origié dans un autre district.

Judgment rendered 30th March, 1864.

This was an action against the defendant, described as of the Parish of Ste. Therese, in the District of Terrebonne, to

(1) *Lavoie vs. Gravel*, 6 L. C. Jurist. p. 113.

recover portion of a *prix de vente* of a piece of land sold under a notarial deed of sale passed at St. Therese on the 12 April, 1860, by one Leblanc, by whom the monies were transferred to the plaintiff.

The defendant pleaded by declinatory exception, that he could not be sued by process served at his domicile, from the Circuit Court in the District of Montreal, but should have been sued in the Circuit Court at Terrebonne, on the well known principle *actor sequitur forum rei*. The plaintiff answered that the land sold lay within the District of Montreal, and that therefore the suit was properly commenced.

LORANGER, Justice.—Held the exception to be well founded. The cause of action arose from the sale ; the deed was passed in the District of Terrebonne within which the defendant resided. The attempt made in the cause to prove that the negotiations for the sale, and the sale itself, took place within the District of Montreal had failed ; nor could parol evidence to prove such facts be allowed. It could not be said that the whole cause of action had arisen within the District of Montreal, and the defendant must therefore have *congé* of the demand.

Judgment.—“ Considérant que lors de l’assignation le défendeur était, comme il est encore, domicilié en la paroisse de Ste. Thérèse de Blainville, dans le district de Terrebonne, où il a été assigné, que la cause d’action qui est la vente consentie par le nommé Julien Leblanc au défendeur, en la paroisse susdite, est née dans le district de Terrebonne, et que l’exploit d’assignation et les libelles de la demande n’offrent aucune des conditions voulues par la loi, et dont le demandeur a justifié, pour donner juridiction au tribunal sur le présent litige, maintient l’exception déclinatoire produite par le défendeur, déclare que le défendeur était mal assigné, et lui donne congé de la demande et exploit d’assignation, avec dépens. ”

MOREAU, OUMETTE and CHAPELEAU, for plaintiff.

BELLE, for defendant.

COUR DE CIRCUIT.—QUEBEC.

Présent :—TASCHEREAU, Juge.

No. 31. { RHÉAUME..... *Appelant.*
 et
 LA CORPORATION DU COMTÉ DE LOT-
 BINIÈRE..... *Intimée.*

Jugé :—1o. Que le Conseil Municipal d'un comté, et la Corporation de ce même comté, sont une seule et même personne.

2o. Que, dans l'espèce, les délais dans lesquels la signification du cautionnement et de la requête doit être faite, ne sont pas à peine de nullité.

Held :—1o. That the Municipal Council of a county, and the Corporation of the same county, are one and the same.

2o. That, in the case submitted, the delays within which the service of the bail bond and petition must be made, are not on pain of nullity.

Jugement rendu le 24 mars, 1864.

Cette cause était un appel à la Cour de Circuit, d'une décision d'un conseil de comté, homologuant un procès verbal, relatif à un chemin et pont, et institué sous l'empire de la section 67 chap. 24, du Statut Refondu du Bas-Canada. (1)

Par les sous sections 5 et 8 de la section sus citée, il est réglé que l'appelant devra signifier copies du cautionnement et de la requête en Appel, sous quinze jours du jugement, au Juge qui aura prononcé le jugement, et sous vingt jours à la partie intimée. L'appelant ne s'étant pas conformé à cette exigence de la loi, et n'ayant fait faire, dix-neuf jours après le jugement, qu'une seule signification au secrétaire-trésorier du Conseil Municipal du comté de Lotbinière, l'intimée fit motion que l'appel fût débouté pour insuffisance de signification.

Bossé, J. G., pour l'intimée.—L'intimée en cette cause est la Corporation du comté de Lotbinière, et le tribunal qui a prononcé le jugement dont est appel est le Conseil Municipal du même comté.—Ce sont deux personnes morales bien distinctes en loi ; l'une est la Corporation, le corps poli-

[1] *Vide* 24 Vic., chap. 30.

tique, incorporé, représentant le comté ; l'autre, le Juge on pouvoir exécutif de la Corporation.—Les deux sections du Statut pouvaient et devaient donc être suivies, puisque les deux significations voulues pouvaient se faire sur deux différentes personnes ; or, une seule signification a été faite, dix-neuf jours après le jugement, au secrétaire trésorier du Conseil, ce qui ne peut valoir, comme signification sur l'intimée, qui ne peut être assignée par le secrétaire trésorier du Conseil, et ne peut valoir non plus comme signification au Juge, puisqu'elle est faite après les délais voulus.—D'ailleurs, de deux choses l'une, ou bien le Conseil de comté et la Corporation sont deux personnes distinctes, et alors il aurait fallu deux significations, ou bien elles sont une seule et même personne, et alors la même personne se trouverait à la fois Juge et intimé, ce qui est impossible. Le Statut a donné un appel sous les conditions qu'il indique, et à ces conditions seules ; et si l'appelant ne s'y est pas conformé, son appel doit être débouté.

GLEASON, pour l'appelant.—J'admets que la signification faite au Juge n'a pas été faite dans les délais voulus, mais le Conseil et la Corporation du comté sont une seule personne. C'est là ce qui arrive le plus souvent, et c'est là ce que la loi a dû avoir en vue. L'on permet ordinairement d'amender les défauts qui peuvent se rencontrer dans les appels, et l'irrégularité dont on se plaint n'est pas une de celles qui doit faire priver une partie de son recours devant un tribunal Supérieur.

TASCHEREAU, Juge.—La motion doit être renvoyée.

1o. Parceque le Conseil Municipal d'un comté, et la Corporation de ce même comté sont une seule et même personne.

2o. Parce que les clauses du Statut qui prescrivent le temps dans lequel les significations des cautionnement et requête doivent être faites, ne sont pas à peine de nullité, et que les délais n'y sont pas fixés d'une manière absolue.

3o. Parce que les règles d'interprétation veulent que l'on applique plutôt l'esprit que la lettre de la loi.

Motion renvoyée.

FOURNIER et GLEASON, pour l'appelant.

Bossé et Bossé, pour l'intimée.

SUPERIOR COURT.—MONTREAL.

Before :—BERTHELOT, Justice.

CONTE.....*Plaintiff,*

vs.

GARCEAU.....*Defendant.*

Held :—That in an action by a plaintiff against his father in law, for harboring the plaintiff's wife and refusing to send her back to the plaintiff's domicile, the action was substantially an action of damages for personal wrongs, and that, therefore, the defendant was entitled to demand a trial by Jury.

Jugé :—Que dans une action par un demandeur contre son beau-père, pour avoir reçu la femme du demandeur et avoir refusé de la renvoyer au domicile du demandeur, l'action était de fait une action en dommages pour injures personnelles, et que, partant, le demandeur avait le droit à un procès par jury.

Judgment rendered the 30th March, 1864.

In this case, the plaintiff alleged his marriage in September, 1861, to Marguerite Garceau, the defendant's daughter; that in August, 1863, the wife abandoned the conjugal domicile, and went to the house of the defendant who had ever since kept her, and refused, as well verbally as in writing, to send her back. Then followed an allegation that "by such conduct" the plaintiff had been deprived of his wife, and of her services and attention, and had suffered damage in his reputation, his feelings and his honor, to the extent of £60.

Conclusions :—That the defendant be condemned to send back the plaintiff's wife within a delay to be fixed by the Court, in default whereof, that the plaintiff, without any other

judgment, be authorized to seek for his wife in the defendant's house, and to take her away by all legal means, praying also that the defendant be forbidden to take the wife back into his house, and for a condemnation for £60 damages.

By his plea, the defendant declared his option for a trial by jury, *s'en rapportait au pays*, and the plaintiff afterwards moved to strike out that part of the conclusions of the plea having reference to a jury trial.

BERTHELOT, Justice.—Stated the pleadings and held that the action as brought was substantially an action of damages against the father in law, for alleged injuries, done by him to the plaintiff. He held that this constituted a “personal wrong, proper to be compensated in damages” under the Statute, (1) and that a trial by jury ought therefore to be allowed. Motion dismissed.

LAFREY and ARMSTRONG, for plaintiff.

LEBLANC, CASSIDY and LEBLANC, for defendant.

SUPERIOR COURT.—MONTREAL.

Before :—BERTHELOT, Justice.

No. 528.	{	GIRoux.....	Plaintiff,
		vs.	
		GAREAU.....	Defendant.

Held :—That an affidavit for a writ of *saisie-arrest* before judgment, and the writ itself, may be attacked by an exception *à la forme*.

Jugé :—Qu'un affidavit pour un writ de *saisie-arrest* avant judgment, et le writ même, peuvent être attaqués par une exception *à la forme*.

Judgment rendered 30 March, 1864.

The case was commenced by a writ of *saisie-arrest* before judgment, and the defendant filed an *exception à la*

[1] Consol. Stat. L. C., chap. 63, sect. 26.

forme "to the writ and affidavit," on the ground that the defendant was not a trader; that the plaintiff had failed to set forth that after the alleged refusal to settle with the plaintiff, he the defendant had continued to carry on trade; denying the alleged sequestration of effects, and the intention to defraud, and all the allegations of the affidavit; conclusion that the affidavit be declared insufficient and irregular, and that the writ and attachment under it be set aside. The exception was met by an answer in law on the ground that the allegations were not matters of *exception à la forme*, or of any preliminary exception, and were wholly unfounded in law.

BERTHELOT, Justice.—Stated in effect that the judgment of the Court of appeals in the case of Molson's Bank and Leslie, (1) had settled the point raised in the cause; and that an affidavit for *saisie-arrest* might be attacked by an *exception à la forme*. The jurisprudence as settled by that case, had been followed by the other Judges of the Court, and he would not give a judgment adverse to the decision in appeal—at the same time he did not decide that the affidavit could not be attacked by another form of plea. Judgment dismissing answer in law.

JOHNSON and PICHÉ, for plaintiff.

MOREAU and OUVIMETTE, for defendant.

(1) 12 L. C. Rep., p. 265.

SUPERIOR COURT.—MONTREAL.

Before :—SMITH, Justice.

No. 2604. { BEAUDRY..... Plaintiff,
 vs.
 { OUMET, *et al.*, Defendants.

Held :—That the Court, on cause shewn, will discharge a case from the roll for hearing on the merits, and permit the *enquête* to be reopened for the examination of a witness, and will also permit the plaintiff to file his declaration that he intends to make use of the defendants' deposition, notwithstanding that a declaration to that effect, previously made, had been rejected from the record, on the defendants' motion, as irregularly filed.

Jugé :—Que la Cour, pour cause suffisante, rayera une cause du rôle de droit pour être entendue aux mérites, et permettra que l'enquête soit rouverte pour l'examen d'un témoin, et permettra aussi au demandeur de produire sa déclaration qu'il entend se servir de la déposition du défendeur, nonobstant qu'une déclaration à cet effet, faite antérieurement, eût été rejetée du record, sur motion du défendeur, comme irrégulièrement produite.

Judgment rendered the 1st April, 1864.

SMITH, Justice.—In this case the plaintiff has moved that the case be struck from the roll for hearing on the merits, and that the *enquête* of the plaintiff be reopened for the examination of a witness; and also to be allowed to file a declaration that he intends to make use of the deposition of the defendants as witnesses, which declaration had been rejected by a judgment rendered in December 1863, (1) as irregularly filed.

The cause shewn for the examination of the witness, in the affidavit filed, is sufficient. Although the declaration previously made has been rejected as irregularly filed after *enquête* closed, I am disposed to permit the declaration to be filed of record on the reopening of the *enquête*. The Court has a discretion in a case like this for the furtherance of Justice, and it may even be said that although the statute has fixed a delay within which a party must declare whether he avails himself of the deposition of an adverse party, yet the common law gives to a suitor the right to submit the cause to the oath of his adversary, the permission now given only assists to forward the substantial rights of the parties.

ROY, for plaintiff.

MOREAU, for defendants.

(1) *Vide Supra* p. 107.

COUR SUPERIEURE.—QUÉBEC.

Présent :—TASCHEREAU, Juge.

No. 1579. { BOSWELL..... *Appelant*,
 et
 LE MAIRE, LES CONSEILLERS ET LES
 CITOYENS DE LA CITÉ DE QUÉBEC. *Intimés*.

Jugé :—1o. Que la Cour Supérieure a juridiction, comme Cour d'Appel, des jugements de la Cour du Recorder, relativement aux taxes imposées par la Corporation de la Cité de Québec, en vertu de ses règlements.

2o. Que lorsqu'une personne possédant une propriété destinée à un objet spécial, tel qu'une brasserie, a été taxée à plus que la valeur actuelle de sa propriété, en conséquence de la valeur additionnelle qu'elle acquiert par le négoce que l'on y fait, elle ne peut-être taxée en sus sur le revenu annuel de tel négoce.

Held :—1o. That the Superior Court has jurisdiction, as a Court of appeals, from judgments of the Recorder's Court, relating to taxes imposed by the Corporation of the City of Québec, under its by-laws.

2o. That when a party holding a property used for special purposes, such as brewing, has been taxed at more than the actual value of his premises, owing to the increased value given them by the business carried on therein, he cannot be further taxed on the annual revenue of his business.

Jugement rendu le 5 septembre, 1864.

L'appelant en cette cause se plaignait des cotisations municipales de Québec sur sa propriété, comprenant des bâtisses dont il se servait comme brasserie, alléguant :—

“That the aggregate value of nine thousand pounds had
 “been placed upon his real estate in St. Valier street, by
 “the assesment books for the year 1862. That the said
 “real estate consisted of a brewery, and that the machinery
 “and appointments thereof give the same its value, and
 “without them, the said real estate would only be worth
 “about £5000. 0. 0, and would not have a yearly rental of
 “more than £250. 0. 0.

“That he has also been assessed at the sum of seventy
 “five pounds for special tax on brewers, the said tax being
 “based on the yearly valuation of five hundred pounds as
 “assessed in the said assesment book ; that were the yearly
 “valuation reduced to the sum of two hundred and fifty
 “pounnds as it should be, the said special tax should
 “also have a proportional reduction.”

Sur cette plainte qui avait été portée devant la Cour du Recorder de cette cité, jugement fut rendu, déboutant le plaignant de la dite plainte, et c'est de ce jugement que l'appel en cette cause a été institué.

TASCHEREAU, Juge.—Il s'agit en cette cause d'un appel de la décision rendue par le Recorder de la cité de Québec, déboutant la plainte portée par M. Boswell contre les retours de cotisations apparaissant contre lui aux livres de cotisations de cette cité.

Il s'élève en cette cause trois questions :—

La 1ère est celle de savoir si cette Cour, ou la Cour du Banc de la Reine, a juridiction comme Cour d'Appel de la décision du Recorder.

La 2nde. Si les cotisations portées dans les livres de la Corporation de la cité de Québec, contre l'appellant, Boswell, sont exagérées sous le rapport du montant.

La 3ème. Si la Corporation de Québec avait le droit d'imposer ces cotisations.

La 1ère de ces questions est soulevée par les intimés, savoir :—La Corporation de la cité de Québec, qui nie à ce tribunal la juridiction d'appel en semblable matière.

En référant au Statut 19 et 20 Victoria, chap. 106, on voit que ce Statut établit la Cour du Recorder, en la cité de Québec.—On voit par le 22 Victoria, chap. 30. sect. 11, que cette Cour du Recorder a juridiction exclusive, en révision des plaintes relatives aux cotisations en la cité de Québec, et qu'un Juge de la Cour Supérieure, en terme ou en vacance, est le tribunal d'appel des décisions du Recorder. Mais, d'un autre côté, l'on voit, que quoique par le Statut 24 Vict., chap. 26, qui amende et consolide les lois relatives à la Cour du Recorder, et définit ses pouvoirs, il ne soit pas donné à la Cour du Recorder juridiction sur les plaintes en révision de ces cotisations, que lui confère le Stat. 22 Vict., chap. 30., sect. 11, néanmoins, conformément à la sect.

15 de cet acte, c'est devant la Cour du Banc de la Reine que l'on doit porter appel des décisions du Recorder de Québec.

Il est vrai que le Stat. 24 Vict., chap. 26, amende et consolide les lois relatives à la Cour du Recorder, et définit ses pouvoirs, mais on remarque que ces pouvoirs ainsi définis, ne sont que ceux de sa juridiction originale (original jurisdiction) lesquels consistent à décider " toute action portée par la Corporation de Québec pour le recouvrement de taxes et loyers dûs à la Corporation; taxes des marchés, de l'aqueduc, coût de l'introduction de l'eau en aucune maison, taxes payables par le propriétaire, le locataire, toute offense contre la police, et le recouvrement de certaines amendes par suite d'infraction aux lois et règlements de la dite Corporation. "

Mais cette loi n'enlève pas spécifiquement au Recorder la juridiction que lui donne le 22 Vict., chap. 30, sur les plaintes en réformation de cotisations; de fait, cette dernière loi ne fait aucune mention du droit de révision des cotisations.—Il aurait fallu une législation spéciale pour enlever au Recorder une juridiction exclusive que lui donne un Statut particulier, et il ne suffit pas de dire que par implication une juridiction ou un pouvoir ait été enlevé par un autre Statut; selon ce raisonnement le Statut 22 Vict., chap. 30, n'est nullement affecté ni modifié par le Stat. 24 Vict., chap. 26, elle est en toute sa force, et notamment en ce qui concerne la révision des cotisations.

Maintenant quant au droit d'appel qui, par la 24^{me} Vict., est conféré, des décisions du Recorder, à la Cour du Banc de la Reine, on voit que ce droit n'est donné que pour les cas spécifiquement énumérés en le Stat. 24 Vict., chap. 26, sect 15, et qui sont ceux dont il est parlé plus haut. Nulle mention n'est faite dans ce Statut de la révision des cotisations, ni du droit d'appel des décisions du Recorder, à un Juge de la Cour Supérieure, et il est à conclure que la législature n'a pas voulu affecter par le Stat. 24 Vict.,

chap. 26, les pouvoirs qu'elle avait conférés au Recorder et aux Juges de la Cour Supérieure, en vertu de la 22 Vict., chap. 30, sect. 11.

Si l'on décidait que le Stat. 24 Vict., chap. 26, exprime tous et chacun les pouvoirs de la Cour du Recorder, il n'y aurait pas d'autorité légalement et spécialement chargée de réviser les cotisations ; or la loi n'a pu avoir en contemplation une telle idée, de laisser à un cotiseur le droit d'évaluer, et à une Corporation, le droit de cotiser qui que ce soit, sans fournir à cette personne le droit d'appeler de cette cotisation, ou de la faire réviser, ce qui serait le cas, si le Stat. 24 Vict., chap. 26, rappelait le Stat. 22 Vict., chap. 30.

Ce premier point décidé, il devient évident, comme il est dit plus haut, par la simple application de la sect. 15, du Stat. 24 Vict., chap. 26, que la Cour du Banc de la Reine n'est instituée tribunal d'appel des décisions du Recorder, que dans les matières spécialement énumérées en cet acte, et que la juridiction de cette Cour (celle de la Cour Supérieure) quant à l'appel de la décision du Recorder, relative aux plaintes contre les cotisations n'est nullement affectée et reste en pleine force.

La 2^{de} question, qui est celle de savoir si le montant de la cotisation est exagéré ou non, ne souffre pas de difficulté sous le point de vue du quantum.— La preuve faite devant la Cour du Recorder, ne donne pas à la brasserie de M. Boswell une valeur exagérée, si l'on inclut dans la valeur de la propriété celle du mécanisme nécessaire pour faire fonctionner une brasserie : mécanisme tenant à fer et à cloux, tellement indispensable, que sans ce mécanisme la brasserie ne serait plus une bâtisse où l'on fabriquerait la bière ou autre liqueur, et tomberait dans la catégorie des propriétés sans nom, sans but et sans utilité spéciale. Les cotiseurs ont donc bien fait de cotiser la propriété de la brasserie en y comprenant la valeur du mécanisme ; on a voulu faire une distinction entre le métier de *malting* et de *brewing* qui s'exerçait dans le même édifice, comme dis-

tinct et séparé, mais on perd de vue que le *malting* est le procédé de préparation au *brewing*, et que le tout se confond dans l'occupation principale, qui est le *brewing*.

Mais s'élève sous la 3ème question, le point décisif en la cause. La Corporation a-t-elle le droit d'imposer une taxe sur la brasserie comme brasserie, et en même temps imposer une taxe sur le brasseur, en raison directe de la cotisation qu'il paie pour sa brasserie, ou le lieu où il exerce son industrie?

En un mot, cette dernière taxe, ne serait-elle pas la répétition de la première, sous un autre nom, au lieu d'être uniforme pour tous les brasseurs, savoir, d'un prix fixe, déterminé, comme nous en donne l'idée du mot "*tax*," *duty*?

Je crois que la Législature, en donnant à la Corporation le droit de taxer les propriétés et les personnes, n'a point voulu lui donner le droit de taxer deux fois une propriété, mais seulement une seule fois, à raison de sa valeur annuelle, et que, quant au métier de la personne, la Législature a voulu qu'il pût être taxé, non pas en raison de son profit, de sa valeur, de son rapport, eu égard à la valeur plus ou moins grande du local où s'exerce ce métier, mais qu'il fût taxé comme métier, d'une manière uniforme pour tous ceux qui exercent ce métier, sans savoir si ce métier s'exerce dans une propriété de £10,000 ou de £500. Car, en réalité, c'est taxer deux fois le brasseur pour la même chose, que de lui imposer, comme la Corporation l'a fait à l'égard de M. Boswell, d'abord une taxe de \$150 sur sa brasserie, estimée à \$500 par année, et ensuite de lui imposer une taxe de \$300, comme taxe des brasseurs; sur le principe que M. Boswell, d'après le règlement de la Corporation de Québec, doit payer comme brasseur une taxe de 15 pour cent sur la valeur annuelle de la brasserie. Le règlement de la Corporation de Québec, du 25 août, 1859, en ce qui concerne la taxe que la Législature lui permettait d'imposer, par l'acte 18 Vic., chap. 159, sec. 51, sous-sec.

2, aux brasseurs, comme métier, est illégal et non conforme à l'esprit de la loi ; car ce règlement dit, par les articles Nos. 1 et 2, qu'il sera imposé un chelin et demi de taxe sur le revenu annuel de toute propriété, ce qui renferme une brasserie ou toute autre fabrique ; et ensuite ce règlement, par la sec. 28, impose une taxe de 15 par cent sur le revenu annuel de chaque brasserie, ce qui, dans mon opinion, est contraire aux pouvoirs de la Corporation—qui ne peut imposer aux brasseurs qu'une taxe fixe, uniforme, comme métier, et non proportionnée aux revenus du local où s'exerce ce métier.

Pour ces raisons, je crois devoir dire que la taxe de \$150, imposée sur la brasserie, comme propriété, a été légalement imposée, mais qu'en raison de l'illégalité du règlement au dit article 28, la Corporation de Québec ne peut recouvrer de M. Boswell la taxe de \$300, imposée sur lui, comme brasseur, calculée sur le revenu annuel de sa brasserie :—en conséquence, le jugement du Recorder est modifié, en ce que l'item de \$300, chargé contre l'appelant, est retranché, et il est ordonné que ce montant soit retranché du livre de cotisations, avec dépens contre la Corporation.

La Cour, etc.—Considérant que cette Cour a juridiction pour connaître de l'appel susdit, et considérant que telle juridiction, comme Cour d'Appel en pareille matière, n'a pas été enlevée par l'acte ou statut provincial passé en l'année vingt-quatrième du règne de Sa Majesté, chapitre vingt-six, et que l'appel accordé par le dit statut à la Cour du Banc de la Reine, n'est que de la décision de certaines causes civiles ou infractions des lois et règlements de police énumérées au dit acte, et que le statut passé en la vingt-deuxième année de Sa Majesté, chapitre trente, section onze, n'est nullement rappelé par le dit statut 24 Victoria, chapitre 26, ou aucun autre statut :

Considérant qu'il n'y a pas eu exagération dans l'évaluation de la brasserie du dit Joseph Knight Boswell, ni dans l'estimation de sa valeur annuelle, et que la Corporation de

Québec était légalement revêtue du pouvoir d'imposer la taxe ou cotisation apparaissant sous le No. 1, dans l'état ou extrait des livres de cotisations de la dite Corporation de Québec, au montant de cent cinquante piastres, et qu'il était permis aux cotiseurs de faire entrer dans l'estimation de la propriété de la brasserie, et dans la cotisation d'icelle, la valeur du mécanisme d'icelle brasserie :

Considérant que la Corporation de Québec, n'avait pas, par la loi, lors du vingt-cinq août, mil huit cent cinquante-neuf, le pouvoir de taxer deux fois le même immeuble pour le même objet, mais pouvait taxer une seule fois la brasserie du dit Joseph Knight Boswell, et le taxer lui-même comme exerçant un métier, savoir : celui de brasseur :

Considérant que la cotisation de trois cent piastres, que les intimés réclament contre l'appelant a été imposée contre l'appelant, par suite de la section 28, du règlement de la dite Corporation, fait et passé le vingt-cinq avril, mil huit cent cinquante-neuf :

Considérant que la dite section du dit règlement impose contre les brasseurs une taxe de quinze louis, pour chaque cent louis de la valeur annuelle cotisée de la brasserie de tel brasseur, et que ce moyen de taxer n'est pas uniforme, et n'est pas conforme aux exigences de la loi; la Cour déclare la section 28, du susdit règlement, illégale, et ordonne que la somme de trois cent piastres imposée et chargée contre le dit Joseph Knight Boswell comme brasseur, et apparaissant dans le livre de cotisations de la dite Corporation, contre le dit Joseph Knight Boswell, soit retranchée des dits livres de cotisations, et condamne le Maire, les Conseillers et les Citoyens de la cité de Québec, à payer à l'appelant Joseph Knight Boswell, les frais par lui encourus sur son présent appel.

CAMPBELL et GIBSON, pour l'appelant.

BAILLARGÉ, L. G., pour les intimés.

BANC DE LA REINE, } DISTRICT DE MONTREAL.
 EN APPEL.

Présents :—DUVAL, Juge-en-Chief, MEREDITH, MONDELET,
 DRUMMOND et BADGLEY, Juges.

BOSTON, *et al.* Appelants,

et

LELIÈVRE *et al.* Intimés.

Jugé :—Qu'un jugement de la Cour Supérieure sur un writ de *Certiorari* est un jugement final et en dernier ressort ; et que, dans l'espèce, il n'y a pas appel de tel jugement à la Cour du Banc de la Reine, telle que constituée dans le Bas-Canada.

Held :—That a judgment of the Superior Court rendered on a writ of *Certiorari* is a final judgment ; and that, in the case submitted, no appeal from such judgment lies to the Court of Queen's Bench, as constituted in Lower Canada.

Jugement rendu le 6 septembre, 1864.

Appel d'un jugement de la Cour Supérieure, (MONK, Juge) rendu le 27 juin, 1862, annulant un bref de *certiorari* émané de la même Cour, le 4 décembre, 1861, à la requête de feu M. Boston, en son vivant seigneur des seigneuries Thwaite et St. James, pour la révision de la décision finale rendue le 29 mai, 1861, par MM. Lelièvre, Dumas et Delagrave,—Commissaires Réviseurs sous l'autorité de l'acte seigneurial—la dite décision finale confirmant un jugement de Henry Judah, commissaire sous l'autorité du même acte, dont feu M. Boston avait appelé devant eux.

Le 2 mars, 1863, les intimés présentèrent une motion pour faire rejeter le bref d'appel en cette cause ; 1o. " Parce que le jugement rendu en la dite cause ou instance par la dite Cour Supérieure du et pour le Bas-Canada, siégeant en la dite Cité de Montréal, le 27 juin, 1862, et dont se plaignent les dits appelants, est un jugement final et en dernier ressort " ; 2o. " Parce que par et en vertu d'un Acte du Parlement de cette Province, il est déclaré qu'il n'y aura aucun appel de tel jugement. " (1)

(1) Stat. Ref. B.-C., cap. 88, sec. 17 :—Ibid. cap. 41, secs. 19 et suiv. :—Ibid. cap. 89, sec. 6 :—Bazin et Crevier, 3 Revue de Leg., p. 40.

Le 5 septembre, 1863, la même motion fut renouvelée de la part de l'Honorable A. A. Dorion, alors procureur-général pour le Bas-Canada, le jugement sur cette motion est comme suit :—

The Court, &c. Considering that in and by the judgment and decision of Henry Judah, Esquire, one of the commissioners under the Seigniorial Act, in the matter of the said Fiefs of Thwaite and St. James, dated the sixteenth April, one thousand eight hundred and fifty seven, and complained of by the said petitioner, there does not appear to be or to have been any excess of authority or jurisdiction exercised by the said Henry Judah : Considering that by his petition in appeal from the Judgment and decision of the said Henry Judah, in due course of law, to the revising commissioners Siméon Lelièvre, Norbert Dumas and Cyrille Delagrave, he the said petitioner did in effect recognize the jurisdiction and authority of the said Henry Judah, and of the said revising commissioners to adjudicate and decide upon all and every the claims, pretensions and rights of him, the said petitioner, in the matter of the said Fiefs and seigniories of Thwaite and St. James : Considering that in the final judgments and decisions of the said revising commissioners, Siméon Lelièvre, Norbert Dumas and Cyrille Delagrave, made and rendered in the matter of the said Fiefs and seigniories of Thwaite and St. James, on the twenty ninth day of May, one thousand eight hundred and sixty-one, confirming the aforesaid judgment and decision of the said Henry Judah, of the sixteenth April, one thousand eight hundred and fifty seven, and of which final judgments and decisions the said petitioner has also in and by his said petition complained, there does not appear to be or to have been exercised any excess of authority or jurisdiction by the said revising commissioners, notwithstanding that some of the claims for indemnity made by the said petitioner, which were rejected by the said Henry Judah, and the said revising commissioners, as illegal, appear to be well founded in law, and that the said petitioner ought to have been admitted to proof in respect thereof :

Considering that none of the aforesaid judgments and decisions can in law be impeached, questioned, invalidated or quashed by proceedings under and in virtue of a writ of *certiorari* in the manner and from sought by the said petitioner, doth grant and declare absolute the said rule to quash and set aside the said writ of *certiorari*, with costs, and the proceedings and record in this matter are ordered to be remitted to the said revising commissioners.

BARNARD, for appellants :—Besides the question whether the English law grants a writ of *error* in a case of *certiorari*, and the other question whether under the Statutes giving special powers to our Court of Appeals, an appeal lies here, if it does not in England—there is the further question whether this is strictly the case of an appeal on a *certiorari*.

As to the law in England, no case is cited specially relating to *certiorari*. The only cases relate to peremptory *mandamus*. “As at common law, says Tapping, on *Mundamus*, p. 397, a writ of *error* does not lie except upon “a judgment, or on an award in the nature of a judgment, “the words of the writ being, ‘*Si iudicium, redditum sil, &c.*’ so it was at an early period held not to lie to “review the decision or judgment of the Court of B. R. on “the award of peremptory *mandamus*, because there was “no record on which error could be brought, it being a “mere award of the writ.”

The reason given in *R. vs. Trinity*, 8 Mod, 27, and 1 Strange, 526, is the omission in the judgment of the words, *idea consideratum est*. If we suppose in existence a Court of Revision with the powers naturally incident to such a Court, such reasoning must be considered very unsatisfactory; for whatever the form adopted, there is a decision involving perhaps the most important matter which can be conceived, and that decision, it might be, a final one. It is possible the form of the proceedings worked in a manner which was not intended, the absence of record making an

appeal impossible. The Court of B. R. issuing prerogative writs, was moreover for a long period absolutely the Court of last resort, the Court of Exchequer, as first created, having been invested with the powers of a Court of error only in cases expressly limited, (1) and the jurisdiction of the House of Lords being considered an usurpation, and constantly, if not always, openly resisted. (2)

In two of the leading cases, (3) the Judges were inclined to think error would lie, if costs had been awarded by the Court below.

The stats. 9 Ann, c. 20—1st Wm. 4, c. 21, having permitted the joinder of issue on the return to a writ of *mandamus*—the objection founded on the absence of a formal judgment, and probably of a record, disappeared, and error was held to lie. In a more recent statute, 6 and 7 Vic., c. 67, the right to an appeal was specially recognized, even it is thought in cases of peremptory *mandamus*. But whatever progress the question seems to have made in England, a special reference to the last mentioned statute, and to the case of *R. vs. Manchester R. & Q. B. R.*, p. 528, decided in 1842, previous to the passing of the stat. 6 and 7 Vic., c. 67, must produce the conviction that the question has not yet been considered in England in all its relations, and that much remains to be done before it is placed upon a logical basis.

In the year 1842, the question received much attention in the United States, on the occasion of the celebrated Canadian case of *Holmes*—who asserted the principle, that Courts of revision of right have the revision of decisions rendered on prerogative writs. Such was in effect the view taken by Judge Story, Chief-Justice Taney, and two other Judges of the Supreme Court of the United States, and it was the means of saving *Holmes'* life. (4)

(1) 3 Stephen's Com., p. 419.

(2) 2 Chitty's Practice, p. 585.

(3) *Dean vs. Dowgatt P. Wms.*, 348, and *Dean Dunblin vs. King*—1 Bro., P. C. p. 73.

(4) The case is fully reported in 14 Peters, p. 540.

It is upon a consideration of all that can be said on the subject that Chief-Justice Redfield seems to have arrived at the very natural and reasonable conclusion that where the Court having jurisdiction to award the writ is not the Court of last resort, its judgments are revisable. (1)

It must be obvious that to establish that error lies in the case of *mandamus*, is to establish that it lies in the case of all prerogative writs. By the writ of *certiorari*, the Court exercising the superintending jurisdiction controls the inferior jurisdictions, as it controls them by the writ of *mandamus*. The essence of both writs is the same—only that in practice *mandamus* is used to set a jurisdiction in motion, and the *certiorari*, in general, to correct its judgments. But in practice the two writs are often merged, *certiorari* becoming *mandamus* and *viceversa*, vide an instance in Redfield on Railways, p. 469.—Vide also on the identity of nature of *certiorari* and *mandamus*, 3 Stephen's Com., p. 405. (2)

If the views above expressed be concurred in it could not be considered strange that while the proceedings in *error*, on *mandamus* and *habeas corpus* remained in such an unsatisfactory position, no proceedings in *error* should have been attempted in *certiorari*, with which are seldom connected matters of great importance.

So much for the law in England. But whatever doubt, if any could exist there, none under the constitution of our Court of appeals can exist here. (3). The language used is immeasurably stronger than that used in the Statutes creating Courts of Error in England, or the United States; and moreover an appeal under the last mentioned section is given from *any* judgment in all cases where the matter in dispute exceeds £20 sterling; attention is particularly called to the observations of the judges already mentioned

(1) Redfield on Railways, p. 468.

(2) 1 Tidd. 397, et seq.—Idem., 2nd vol. pp. 1134, et seq.—2 Chitty, pp. 353. et seq.—Idem pp. 218, et seq., and p. 375.

(3) Cons. Stat. L. O., cap. 77, secs. 4, 5, 23.

in the case of Holmes, on the question whether the word *suit* was sufficiently broad to cover a writ of prohibition. (1)

With regard to the effect of sec. 16, cap. 88., Cons. Stat. L. C., it is not apprehended it could give rise to much difficulty. If the appellants have not the right of appeal *aliunde*, this Statute does not give it to them. But if they have it, this Statute does not take it away. (2)

With regard to the last question, although the judgment has been rendered on the occasion of proceedings in a case of *certiorari*, the appeal from that judgment cannot strictly be said to be an appeal on a *certiorari*. The question raised on the appeal has nothing whatever to do with the right of the Superior Court to issue the writ, or with the expediency of issuing it, or with the illegality of the proceedings sought to be corrected. All these questions are settled. The writ has issued. The commissioners in compliance with its exigency, have returned their proceedings, and the Superior Court has declared they ought to be corrected.

The object of this appeal is simply to establish that the Superior Court has the power to grant the redress which it declares ought to be granted ; and that section 29 and the second paragraph of sec. 19 of cap. 41, of the Cons. Stat. of L. C., have not taken away the power to give redress. Upon this point the appellants have every confidence they will be able to convince this Court, and they send herewith, a memorandum of the authorities upon which they rely. But certainly the objections taken in England cannot apply here—since there is a formal judgment drawn up in the ordinary form, and it carries costs, and there is moreover a record, since it has been transmitted and it is now before this Court.

MONDELET, Juge.—Je ne comprends pas comment il se pourrait faire qu'il y eût lieu à un appel à cette Cour, d'un jugement rendu par la Cour Supérieure sur un *Certiorari*.

[1] Holmes vs. Jennisson, 14 Peters' Rep., p. 566.

[2] Dwarria, p. 673.

La Cour Supérieure a, à l'égard des *writs* de prérogative, et de la surveillance inhérente à sa constitution, sur tous les tribunaux inférieurs, la même juridiction que la Cour du Banc de la Reine, en Angleterre, laquelle est une Cour de première instance.

Il n'en est pas ainsi de la Cour du Banc de la Reine en Canada, dont le nom est une anomalie, qui n'eût pas existé si, comme à Madras, Bombay, Calcutta, Ceylan, Hong-Kong, à la Nouvelle-Zélande, dans la Terre de Van-Diemen, dans la Nouvelle-Galles du Sud, à la Jamaïque, dans les provinces du Nouveau-Brunswick, de la Nouvelle-Ecosse, de Terre-Neuve, dans toutes les Colonies Anglaises enfin, à l'exception de l'Isle de Jersey, où la Cour en dernier ressort, porte le nom de Cour Royale de l'Isle de Jersey, (Royal Court of the Island of Jersey,) et du Haut et du Bas-Canada,—on eût appelé notre Cour du Banc de la Reine "Cour Suprême," en lui attribuant, en même tems, cela va sans dire, une juridiction appellative. En Canada, la Cour du Banc de la Reine, en matières civiles, n'a aucunement la surveillance des tribunaux inférieurs. Sa juridiction est appellative, voilà tout. Quant aux *writs* de prérogative, elle n'a d'autre juridiction, dans leur exercice, que relativement à l'*habeas corpus*.

Si l'on prétendait que la Cour Supérieure, en s'occupant, comme elle l'a fait, de la matière qui lui était soumise, a excédé sa juridiction, la seule conclusion à en tirer, c'est que son jugement serait une nullité; il n'y aurait pas de jugement—et alors, il y aurait encore bien moins un droit d'appel à la Cour du Banc de la Reine en Canada.

Je pense, donc, que l'appelant doit être éconduit de cette Cour, avec dépens, c'est-à-dire, que la motion des intimés pour faire mettre au néant le *writ* d'appel, doit être accordée, avec dépens.

BADGLEY, Justice.—Under the seigniorial acts, schedules prepared by commissioners are subject to revision by a Court composed of three commissioners, excluding the

schedule commissioner, the decision of any two of whom shall be final. (1)

For this purpose of revision that *Court shall hear, try and determine* the matters alleged in the petition for revision (sec. 22) and *may award costs*, (sec. 23).

The place of the sittings for *the Court* are fixed by sec. 24.

And this *Court of revision* is authorized to decide, of itself, points not settled by the special seigniorial Court.-- (sec. 25).

The commissioners thus acting in revision are therefore constituted a Court, having the attributes thereof as above.

By Con. Stat. L. C., cap. 78, sec. 4, the Superior Court for Lower Canada has the power following: "Excepting the Court of Queen's Bench, all Courts and magistrates, and all other persons, and bodies politic and corporate within Lower Canada, shall be subject to the superintending and reforming power, order and control of the Superior Court and of the Judges thereof, in such sort, manner and form as by law provided;" and the Superior Court is substituted in effect for the Court of Queen's Bench abolished by the 12 Vic. c. 38, and endowed with all its superintending and reforming power.

The attributes of the Superior Court are therefore in this respect extremely general and very large over all inferior Courts, but mention is not made or specified of its particular constituents or of its mode of application of its superintending power, and differing from the more limited power of this character conferred upon the Circuit Court by ch. 79, sec. 3, sub-sec. 2, which gives to the latter a concurrence of jurisdiction with the former for the issuing of writs of *certiorari* relative to proceedings had before Justices of the peace and Commissioners of small causes. In the Circuit Court, therefore, the superintending jurisdiction is specified and limited, and the mode of operating it by *certiorari* is settled.

(1) Con. Stat. L. C., cap. 41, sec. 19, sub-secs. 1, 2, 3, pp. 409, 410.

Now the seigniorial statutes provide that the judgment of revision shall be final; but this provision of finality does not take away or control the superintending power of the Superior Court, and beside this, speaking for myself as to the extent of finality, I consider it a restricted one, because, taken in connection with the peculiar and exceptional jurisdiction attributed to the commissioners, the finality appears to me to be personal as regards them and their action. But be that as it may, that Court is unquestionably subject to the superintending power of the Superior Court.

The question remains, how that power of the Superior Court is to be applied in this case. The question is solved by the parties themselves by the issue of a writ of *certiorari*; and the right to use that writ appears to me to be entirely undeniable, because it is a beneficial writ for the subject, and in general cannot be taken away without express words in the statute. The seigniorial statute contains no such words, and hence the writ of *certiorari* issued herein, and which is a legitimate means of enforcing the reforming power of the Superior Court over inferior jurisdictions, was well issued. (1)

In principle, *certiorari* lies to all Courts where the Superior tribunal can administer the same justice as the Court below, and also, though the cause cannot be determined in the higher tribunal, yet this writ may be granted if the inferior tribunal have no jurisdiction over the matter, or do not proceed therein according to the provisions of law; hence, though the jurisdiction of the Superior Court is not taken away except as above, its power is limited to *judicial proceedings*, and therefore the *certiorari* does not go to try the merits of the question, but to see whether a limited jurisdiction has exceeded its bounds and has not acted in conformity with the law. It is therefore more beneficial than a *habeas corpus*, which only removes the plaintiff, the *certiorari* brings up all the proceedings of the Inferior Court for examination and for comparison of its

[1] 1 Bl. R. 231:—2 Burr. 1040:—5 Peterdoff, 153.

proceedings with the law of its action. The *certiorari* does not take away the jurisdiction of the Inferior Court; and that power, consequently, (1) of Superior Courts of record, to inspect proceedings of Inferior Courts, and enable them to set aside the whole or part of the proceedings of those Courts had beyond their power or contrary to their duty or authority, and if partial, to leave the remaining part untouched, clearly exists.

Now assuming the legality of the principles above stated, the test of the jurisdiction in this case is, whether the Court of the Commissioners had or had not power to revise and did revise in conformity with the law; not whether the conclusions of that Court were true or false, legal or illegal; therefore, in this sense, and in this case, it is unquestionable that the Court of the commissioners had jurisdiction.

It appears that the Superior Court, by its judgment upon the *certiorari*, has undertaken to pass upon the proceedings of the Commissioner in the preparation of the schedule, which was revised by the judgment of revision complained of, as well as upon that judgment of revision. It would seem that the judgment of the Superior Court upon the Commissioner's proceedings in the preparation of the schedules is questionable, but that judgment upon the judgment of revision, whether correct or not in part, must stand undisturbed by the Court, because being a judgment on *certiorari* this Court has no authority to entertain an appeal thereupon.

Whatever are the legal attributes of this Court in ordinary cases submitted to it, proceedings upon *certiorari* are subjected to and governed by express enactments which control this Court in such proceedings.

By Con. Stat. L. C., cap. 89, proceedings upon writs of prohibition, *certiorari* and *scire facias* are provided for and regulated, and by the 6th section, it is enacted, that: "Appeals from final judgments rendered under the Act, except in cases of *certiorari*, are provided for by chapter eighty eight."

[1] 1 *Ld. Raym.*, 213 :—5 *Petersdoff*, 162.

By cap. 88, sec. 17, it is enacted: "That an appeal shall lie to the Court of Queen's Bench sitting in appeal, from all final judgments rendered by the Superior Court, in all cases provided for by this Act, and chapter 89, of these Consolidated Statutes, *except cases of certiorari*."

It is true in principle that error in point of law in giving judgment can only be avoided by an appeal, but it is equally true that when that appeal is prevented clearly by statute, the error, if it be one upon the *certiorari*, must stand.

Now the words of the statutes as above are clear and precise, and render it imperative upon this Court to declare that the statutory exception as to appeals to this Court, prevents the judgment of the Superior Court upon the *certiorari* in this cause, from being brought within its appellate jurisdiction for any proceeding whatever, and particularly by a writ of appeal, which cannot therefore be sustained.

MEREDITH, Justice.—The Provincial Court of Appeals, in the case of Coffin appellant and Gingras respondent, (1) allowed an appeal from a judgment upon a writ of *certiorari*; but subsequently the same Court held that there cannot be an appeal in such case. (2)

The latter decision seems to me to be justified by the statute defining the powers of this Court, (3) and also by the statute determining the powers of the Superior Court with respect to inferior jurisdictions. (4)

The matter in controversy in this cause is as to whether the seigniorial commissioners exceeded their jurisdiction. There is not any sum of money, or property of any kind, in dispute between the parties before us; and therefore the case does not seem to come within any of the categories

[1] Stuart's Rep., 560.

[2] Bazin et Crevier, 3 Rev. de Leg., p. 401. "Les intimés firent motion que le 'bref d'appel fût déclaré nul, et l'appel mis au néant, sur le principe que la 'Cour d'appel n'avait aucune juridiction pour réviser un jugement rendu dans la 'Cour Inférieure sur *certiorari*.—La Cour est unanime à déclarer cette prétention 'fondée, et déboute l'appel avec dépens.—Présents, Sir James Stuart, MM. Bowen, 'J. Stewart, L. Panet, P. Panet, Bédard.

(3) Con. Stat. L. C., cap. 77, sec. 23.

(4) Con. Stat. L. C., cap. 78, sec. 4.

mentioned in the 23rd section of chap. 77, of the Consolidated Statutes of Lower Canada, which declares in what cases an appeal is allowed from the judgments of the Superior Court. (5)

When, in addition to the provisions of law already referred to, we bear in mind that by the 17th section of chapter 88, of the Consolidated Statutes of Lower Canada, it is declared that an appeal shall lie to this Court from all final judgments rendered by the Superior Court, in all cases provided for by that act, and by the chapter 89, of the Consolidated Statutes of Lower Canada, "*except in cases of certiorari*," and certain other excepted cases, it seems to me that it cannot have been the intention of the Legislature, either when they defined the jurisdiction of this Court, or when they determined the rights of the Superior Court with respect to subordinate jurisdictions, or when they framed the other provisions of law already referred to, to give a right of appeal to this Court, from judgments of the Superior Court in cases of *certiorari*; and I am therefore of opinion that, in conformity with the judgment of this Court in the case of *Bazin vs. Crevier*, we ought to hold that, according to the law of Lower Canada, there is no appeal in such cases.

Whether there ought not to be a right of appeal, in some cases of *certiorari*, is a matter which, it appears to me, is well deserving of the consideration of the Legislature.

The Court, &c.—Considering that the law does not allow an Appeal to this Court from judgments rendered by the Superior Court on writs of *certiorari* issued out of this said Court, the motion of the said attorney general for the quashing and rejection of the writ of Appeal issued in this cause, is granted, and the said writ of Appeal is quashed and rejected.

BARNARD, pour les appelants.

POMINVILLE, pour les intimés.

DORION, W., pour le procureur-général.

[5] See as to this point *Gugy vs. Gugy*, 1 L. C. Rep., 274, and *Loepérance vs. Alard*, note 1, same page.

QUEEN'S BENCH, } DISTRICT OF QUEBEC.
 APPEAL. SIDE. }

Before:—DUVAL, Chief-Justice, MEREDITH, DRUMMOND,
 MONDELET and BADGLEY, Justices.

THE GRAND TRUNK RAILWAY COMPANY OF

CANADA..... *Appellants,*

and

MIVILLE DIT DESCHÊNE..... *Respondent.*

Held:—1o. That a railway Company is responsible for damages suffered by a party, in consequence of the cutting of certain line ditches by the Company in the building of their road; which line ditches served to carry away the waters, the *surplus* waters being thereby made to flow into a water course upon the land of the plaintiff, which land, in consequence of the insufficiency of the water course to carry of such *surplus* waters, was inundated.

2o. That, in such case, the rule of law which says: "That he who in the construction of any work upon his property, uses his right without violating any law, or usage, or title, or contrary possession, is not held for the damage resulting therefrom;" is not applicable.

Jugé:—1o. Qu'une Compagnie de chemin de fer est responsable des dommages soufferts par un individu, en raison de ce que par la construction de son chemin, la Compagnie a coupé certains fossés de ligne qui servaient auparavant à l'écoulement des eaux, et a par cela porté le surplus des eaux dans un cours d'eau sur la terre du demandeur, laquelle, par l'insuffisance de tel cours d'eau à porter le surplus de ces eaux, a été inondée.

2o. Qu'en pareil cas, la règle de droit qui dit que: "Celui qui, faisant un nouvel œuvre sur sa propriété, use de son droit sans blesser, ni loi, ni usage, ni titre, ni possession contraire, n'est pas tenu du dommage qui pourra arriver;" n'est pas applicable.

Judgment rendered the 16th September, 1864.

The action was brought for the recovery of the sum of forty-five pounds, damages alleged to have been suffered by the plaintiff, by reason of his land having been overflowed, in consequence of the neglect of the appellants to keep the ditches on each side of the railway of the company in proper order.

The plaintiff alleged that by deed of sale, executed at St. Roch des Aulnets, before Michaud, notary, 9th April, 1858, he sold to the defendants a piece of land, described as follows: "La dite pièce ou portion de terre, étant partie d'une terre ou plus grande étendue de terrain appartenant au demandeur, située au même lieu et bornée en front par le fleuve St. Laurent, en profondeur par François Miville,

et le second rang, d'un côté par François Miville et Ephrem Hudon, et de l'autre côté par Augustin Miville. ”

That the sale was made for the sum of thirteen pounds one shilling and eleven pence half-penny, and “ à la charge par la dite compagnie de faire ériger à ses frais et dépens, chaque côté du chemin à lisses sur la dite terre, une bonne clôture, devant être entretenue par la dite compagnie défenderesse ; de fournir au demandeur un passage convenable tel que voulu par la loi, pour communiquer d'une partie à l'autre de la dite terre à son besoin, et en outre d'entretenir le dit passage ainsi que tout cours d'eau qui pourront s'y rencontrer, et qu'elle serait sujette à tous les règlements municipaux relativement à iceux. ”

That in the place where the railway passed upon his property, it separated the said property in two portions nearly equal, the ground there lying low, and that by the negligence of the defendants to keep up the ditches which receive the waters which flow on each side of the said railway, the plaintiff had suffered and suffers continual damages by the overflowing of the waters upon the land of him the plaintiff.

The defendants pleaded a simple denegation, and issue was joined by a general replication.

The parties having gone to proof, the following judgment was rendered :

“ La Cour, etc.—Considérant que le demandeur a souffert
 “ des dommages par le débordement des eaux des canaux
 “ ou fossés de la dite défenderesse vis-à-vis la terre du dit
 “ demandeur, et par le fait de la dite défenderesse, tel
 “ qu'allégué dans la déclaration en cette cause, lesquelles
 “ eaux ont couvert de temps à autre une partie de la dite
 “ terre, et notamment dans le cours de l'été et l'automne
 “ mil huit cent soixante; condamne la dite défenderesse à
 “ payer au dit demandeur la somme de douze louis courant,
 “ avec intérêt du cinq de Janvier, mil huit cent soixante-et-
 “ un, et les dépens de la classe de la somme adjugée. ”

LELIEVRE, Q. C., for appellants:—The action in this cause was an action of damages brought by the respondent against the appellants. In his declaration the respondent alleged, that he had sold to the appellants a certain piece of land for the purpose of building a railway upon it. The respondent then alleges that in the place where the railway passes upon his property, it separates the said property into two portions, nearly equal. That the ground lies low there, and that by the negligence of the appellants to keep up the ditches to receive the waters which flow upon each side of the railway, the respondent had suffered and suffers damage.

Now, upon referring to the voluminous evidence taken on the part of the respondent, it will be found that there is not one word to shew, that if the waters overflowed at all, such overflowing was caused by the “negligence of the appellants to keep up the ditches which receive the waters which flow on each side of the said railway,” on the contrary, all the witnesses produced by the respondent say: that the damage which was alleged to have been suffered by the respondent was so suffered by reason of the line ditches of the respondent’s neighbours having been cut by the building of the road, and the waters which usually flowed through these ditches being carried by the lay of the land there, to the land of the respondent and overflowing it; another reason given by the respondents witnesses is, that the ditches of the company on each side of its railway, have been made so deep, that when their waters rise as they usually do in the spring and fall, and after heavy rains, the ditches tap the river, and its waters eventually find their issue over the land of the respondent which it submerges.

It is clear that evidence of this description does not support the allegations of the respondent, that it is by the negligence of the appellants to keep up their ditches that the respondent has suffered damages; in one word, the proof does not quadrate with the allegations.

With respect to the law of the case, assuming for a moment that the respondent has fully made out his allegations in evidence, it is respectfully submitted on the part of the appellants that, even supposing that this low land has been flooded by the building of the railway, they are not liable in damages if they have done no more than was absolutely necessary for the building of their road—the sale by the respondent to the appellants of the ground necessary for the building of the railway, shows for what purpose the land was sold by the respondent and acquired by the appellants—the respondent therefore knew that the appellants were purchasing for the building of their railway. The rule of law in matters of this kind is distinctly stated by some of the most esteemed authors (1).

(1) Mais, pour qu'un homme puisse être responsable du mal dont il est la cause, il faut qu'il y ait une faute dans son action; il faut qu'il lui ait été possible, avec plus de vigilance sur lui-même, de s'en garantir Partout où un homme nuit à un autre par l'ascendant d'une cause majeure, il est affranchi de la réparation; il a été l'instrument passif, et non pas la cause déterminante du malheur qui est arrivé.—10 Merlin, Rep., vbo. Quasi-délit, p. 496.

Celui qui, faisant un nouvel œuvre dans son héritage, use de son droit, sans blesser, ni loi, ni usage, ni titre, ni possession contraire, n'est pas tenu du dommage qui pourra arriver; par exemple si en faisant une digue pour se garantir d'un débordement, il y exposait davantage celui de son voisin, dans ce cas et autres semblables, les événements sont des cas fortuits et des effets naturels de l'état où celui qui fait des changements a droit de mettre les choses. Si l'ouvrage qu'un propriétaire ferait sur son fonds blessait ou quelque loi ou quelque usage, ou si c'était une entreprise contre un titre, ou contre une possession, le voisin qui en souffrirait quelque dommage, pourrait l'empêcher et se faire indemniser de la perte qu'il aurait soufferte. Celui qui prétend qu'un nouvel œuvre entrepris par son voisin lui fait préjudice, doit se pourvoir devant le Juge, qui pourra faire défense de commencer ou continuer les ouvrages, jusqu'à ce qu'il soit jugé si cet ouvrage doit être défendu ou permis. Merlin, Rept.,—vbo. Dénonciation de Nouvel Œuvre, pp. 501 et 502.

On n'est même pas censé en faute, en faisant ce que l'on était autorisé à croire avoir le droit de faire.—A plus forte raison, celui qui ne fait que ce qu'il a réellement le droit de faire, celui qui n'use que de son droit, ne commet aucune faute. S'il en résulte quelque dommage pour autrui, c'est un malheur que l'auteur du fait n'est pas tenu de réparer, et qu'il n'est même pas aux yeux de la loi, censé avoir causé.

Nemo damnum facit, nisi qui id facit quod facere jus non habet.

Par exemple, en creusant un puits dans mon fonds, je détourne la source qui alimentait le puits inférieur de mon voisin. C'est un dommage qu'il éprouve, et qu'il éprouve par mon fait; mais je ne suis point tenu de le réparer, parce que je n'ai fait qu'user de mon droit, sans commettre aucune faute.

Il en est encore de même si je détourne la source, *caput aquæ*, qui prend naissance dans mon fonds, et dont les eaux, depuis un temps immémorial, servaient à fertiliser les fonds inférieurs, ou même que le propriétaire de ces fonds avaient réunies dans un canal, pour alimenter un moulin qu'il fait construire plus bas.

Je ne suis point obligé de réparer le dommage, que cause le détournement de ma source. Telle est la loi de la propriété. 11 Toullier, No. 119, p. 151.

Nullus videtur dolo facere qui suo jure utitur. Loi 55, ff de R. J.

« Celui n'attente qui n'use que de son droit, » dit l'art. 107 de la Coutume de Bretagne. C'est une maxime fondée sur la raison et universellement reçue. « Celui qui use de son droit sans en excéder les justes limites, n'est point tenu à réparer le dommage causé à un autre par l'exercice de ce droit. » Code prussien, 1re part., tit. 6, no. 36. Code prussien, *ibid.*, no. 37.

11 Toullier, p. 150, note.

CARON, pour l'intimé :—Les témoins du demandeur se sont tous accordés à prouver les faits suivants :

- La terre de l'intimé, ainsi que les terres voisines, jusqu'à la distance de plus de quinze arpents de chaque côté s'inclinent légèrement du sud vers le nord ; et toutes ces terres sont égoutées par leurs fossés de lignes, respectifs, qui coulent du sud vers le nord. Jusqu'au temps de la construction du chemin de fer, les dits fossés de lignes ont toujours suffi à égoutter la terre de l'intimé et les terres voisines. Lors de la construction du chemin de fer, l'appelante a fait creuser de chaque côté d'icelui, deux fossés ou canaux d'environ dix pieds de largeur, sur une profondeur de deux pieds et demi. Au moyen de ces deux canaux qui coupent tous les fossés de lignes de la terre de l'intimé et de celles qui l'avoisinent, l'appelante a changé le cours naturel de l'eau, sur les dites terres.

Le niveau de la terre de l'intimé se trouvant un peu plus bas que celui des terres voisines, l'eau qui avant la construction du chemin de fer s'écoulait par les fossés de lignes des dites terres, prend maintenant son cours par les fossés ou canaux de l'appelante jusqu'à l'endroit où le chemin de fer traverse la terre de l'intimé. Rendue là cette eau n'ayant pas d'issue du côté de l'est, coule sur la terre de l'intimé vers le nord jusqu'à la rivière.

Dans les eaux un peu abondantes, une grande partie de l'eau de la dite rivière, au lieu de suivre son cours ordinaire à l'endroit où elle traverse le chemin de fer, coule dans les dits fossés ou canaux de l'appelante vers l'est, jusque sur la terre de l'intimé, sur laquelle elle se répand en coulant vers le nord.

Ainsi donc, tous les actes qui ne sont point nuisibles à la société, et qui ne portent atteinte ni aux *droits personnels*, ni aux *droits réels* d'autrui, sont permis, et ne peuvent être empêchés ni punis, quand même ils causeraient quelque dommage ou préjudice à d'autres personnes : car remarques bien qu'il n'y a que les attentats à *leurs droits* qui soient défendus. Si, en exerçant les miens, sans en excéder les justes limites, je cause à autrui du dommage, je ne suis point tenu de le réparer, parce que je n'ai fait qu'user de mon droit, qu'il est lui-même obligé de respecter. Nous en avons déjà vu des exemples *suprà*, no. 119. 11 Toullier, No. 122, p. 155.

Ces témoins prouvent aussi que les inondations de la dite terre de l'intimé dans le printemps, l'été et l'automne 1860, ont causé plus de trente louis de dommages à l'intimé.

L'appelante a essayé de contredire une partie de cette preuve par des personnes étrangères à la localité en question, dont les témoignages ne peuvent avoir aucun poids.

L'appelante a soulevé la question de droit, savoir : si elle était responsable de dommages causés à l'intimé en usant de son droit de construire un chemin de fer. Sans doute que l'intimé ne conteste pas à l'appelante le droit d'user de sa propriété, mais pouvait-elle au moyen des canaux qu'elle a creusés, changer le cours naturel de l'eau et inonder la terre de l'intimé ? Pouvait-elle aussi changer le cours ordinaire de la rivière et conduire une partie de ses eaux jusque sur la terre de l'intimé sans être responsable des dommages ? Une pareille proposition n'est certainement pas soutenable.

Au reste l'acte d'incorporation de la Compagnie du Grand Tronc permet à l'appelante de construire un chemin, pourvu qu'elle ne fasse aucun dommage ; cet acte lui permet aussi de faire passer le chemin de fer sur les rivières, mais à la condition expresse de remettre les lieux tels qu'ils étaient auparavant. (1) L'Appelante a creusé les bords de la rivière et les a laissés en cet état, ce qui a causé en grande partie les inondations dont se plaint l'intimé.

MONDELET, Justice:—Had I had to decide this case alone, I am inclined to say that I would have dismissed the action, inasmuch as the evidence adduced by the plaintiff and defendants is so contradictory, that the plaintiff and defendants should have had the benefit of such contradictions, and the doubt consequent thereupon. I am, therefore, of opinion that the appellants should be maintained in their appeal, and the judgment of the Court below reversed.

(1) Stat. Ref. du Canada, chap. 66, sec. 9, par. 5.

manner as to drain the lands, through which the line runs, as effectually as they had been drained before the construction of the road, by the old water courses.

The evidence adduced by the company is almost entirely of a negative character, having no reference to the time when the injury complained of occurred, all the appellants' witnesses examined the land only on one and the same occasion, at the request of the officers of the company, after the action had been brought. They know nothing about the state of the land during the time when the damages are alleged to have been occasioned.

Out of the eleven witnesses brought up by the appellants, no less than five were *employés* of the company, and the remainder are persons who resided at a distance from the respondent's farm.

On the other hand, the respondent's witnesses reside in the immediate neighborhood of the farm. Most of them were in the habit of visiting it frequently during the season when the injury is alleged to have been sustained, and are unanimous in their opinions, save some difference in the estimation of damages. They do not appear to have any interest in the matter; and taking everything into consideration I do not think the weight which their testimony should have in the decision of the case, has been materially impaired by the evidence adduced on the part of the appellants. The judgment should therefore be confirmed.

MEREDITH, Justice :—It is, I think, proved that the drains of the Railroad, during freshets, cause to some extent, an accumulation of water on the parts of the respondent's farm which adjoin the road. But it is also proved that the drains on the respondents' farm, were, at the time of the alleged injury, in very bad order; so much so as to make it impossible to say, what proportion of any damage actually sustained, is attributable to the drains of the Railroad.

Besides this the respondent ought to have given notice to

the appellants when, as he contends, he ascertained, that the drains were injuring him; (1) and had this been done, the true extent and cause of the damage, could have been ascertained.

No such notice however was given; and the consequence is that it is impossible to say, with any thing approaching certainty, for what part the Railway company ought to be held liable.

I am satisfied however that the sum of \$50, awarded to the respondent, is amply sufficient to cover the *whole* of his loss; and as, in my opinion, that loss was mainly owing to the natural situation and defective drainage of his farm, I think the appellants have reason to complain of the whole loss having been thrown upon them.

In this, as in most cases of the same kind, there is a very great discrepancy between the *opinions* of the plaintiff's witnesses, as to the sum that ought to be awarded to him, and the *facts* to which they testify; and in forming my judgment, I need hardly say, I have been guided by the facts proved, and not by the speculative opinions of the witnesses, many of whom have made estimates, which, even upon the face of them, are utterly unreasonable.

I now pass from the consideration of the facts, to the questions of law raised in this cause.

On the part of the appellants it has been strenuously contended that if they have done nothing more than was necessary for the building of the road, the respondent, even if he has sustained damage, cannot make any claim against them, for having in a proper manner, exercised powers conferred upon them by the Legislature.

The pretensions of the appellants in this respect are stated in their factum as follows:

"The appellants respectfully submit, that even supposing

(1) See on this subject, *Chase vs. New York Central Railway*, 24 Barbour's Rep., p. 285, cited in *Redfield on Railways*, p. 154, note 6:—also *Lemmer vs. Vermont Central Railway*, cited same page and note.

that this low land has been flooded by the building of the railway, they are not liable in damages if they have done no more than was absolutely necessary for the building of their road—the sale by the respondent to the appellants of the ground necessary for the building of the railway, shows for what purpose the land was sold by the respondent and acquired by the appellants—the respondent therefore knew that the appellants were purchasing for the building of their railway, and it cannot be doubted that the amount asked by the plaintiff, and paid by the defendants, was intended to cover such damages as those pretended to have been suffered by the plaintiff. ”

The point thus submitted is of great importance ; but I do not think the claim advanced by the appellants can be maintained.

It is doubtless proved that the appellants have not done anything beyond what by law they are authorized to do ; and consequently they cannot be treated as wrong doers. But if it be true, as it is, that the law empowers the appellants to build the road, and therefore to make the drains necessary for the purposes of the road ; it is also true that the law requires that compensation shall be made to the owners and occupiers of land injuriously affected by the construction of the Railway.—The provision of our Railway clauses consolidation act, on this subject, is as follows :
 “ And compensation shall be made to the owners and occupiers of and all other parties interested in any such lands
 “ so taken or injuriously affected by the construction of the
 “ Railway, for the value and for all damages sustained
 “ by reason of such exercise, as regards such lands, of the
 “ powers by this or the special act, or any act incorporated
 “ therewith, vested in the company ; and, except where
 “ otherwise provided by this act or the special act, the
 “ amount of such compensation shall be ascertained and
 “ determined in the manner provided by this act. (1)

(1) 14 and 15 Vict., Cap., 51, Sec. 4, The Railway Clauses Consolidation Act ; and see Con., Stat. C., cap., 66.

The appellants, however, say that if the respondent really has sustained any damage, he has been compensated therefor, and they refer to the deed of sale by which the respondent sold to the appellants that portion of his farm required for the purpose of the Railway. In that deed it is declared that the price therein mentioned is:

“ Pour le prix et la valeur de la dite pièce ou portion de terre, et pour le montant de la compensation accordée à la dite partie de la première part pour tous dommages, lui résultants par suite de l'expropriation d'icelle pièce ou portion de terre. ”

As a general rule, I think it may be said that the compensation awarded, or agreed upon, for land taken for the construction of a Railway ought to be regarded as covering, “ all such incidental loss, inconvenience, and damage as may *reasonably be expected to result* from the construction and use of the road in a legal and proper manner. ” (1) But it cannot, in the present case, be presumed that the respondent, when his land was taken, knew what drains would be made by the Railway company, or how those drains would affect *the remainder* of his property. And if proof were wanting to show that the damage, of which the plaintiff complains, was not foreseen and estimated when a part of his land was taken, it would be found in the pretensions of the appellants that their drains *do not cause and cannot cause*, either in whole, or in part, the damage of which the respondent complains. I therefore think that if the land of the respondent is *injuriously affected* by the drains of the Railroad company, the damages, claimable on that account, cannot be regarded as a part of the damages for which the respondent received compensation when his land was taken. In support of this view, I may refer to the *Lancashire and Yorkshire Railway Company vs. Evans*, (2) in which, according to the marginal abstract, it appears that “ a land

(1) *Bedfield on Railways*, page 152, § 74, p. 154, No. 6 :—*Pierce on Am. Railroad Law*, page 224.

[2] *Lancashire and Yorkshire Railroad Company vs. Evans*, 19 *En. Law. and Eq. Rep.* 295.

“owner received, under arbitration, compensation for land
 “and in respect of damages which might be sustained by
 “reason of making a railway,” and it was held “that he was
 “not precluded from insisting on a further compensation
 “for future unforeseen damages subsequently sustained.”

In disposing of the case—Sir John Romilly, the Master of the Rolls, observed: “I am of opinion that the contract
 “means nothing more than this, we can now ascertain
 “what damage has already been done, and what in the
 “ordinary working of the line will be the sort of damage
 “which will probably be produced; that damage is meant
 “to be compensated by this contract; but any future extraordinary damage is not intended to be included in
 “it” (1)

In considering the english authorities on the subject, it is proper to bear in mind, that the english “Railway clauses consolidation act of 1845” (2) makes special provision for the protection of persons owning lands adjoining Railways, with respect to the drainage of such lands—and that no special protective clauses are to be found in our statutes on the same subject.—It therefore follows that the general clause, in our law, securing the owners of land, adjoining a Railway, compensation for any damage to which they may be subjected by the Railway works, must comprise an important class of cases not intended to be included in the *general* clauses of the English Railway acts on the same subject; and this may account for our not finding many cases in the English Reports analogous to the present.

The appellants also contended at the argument before us that the proof of the respondent does not quadrate with his allegations; the pretension of the appellants being that one description of negligence is alleged and another proved.

[1] Vide also, *Pierce on Am. Railroad Law*, page 230. Also 16 Ad. and El. N. S. 681, *Lawrence vs. Railway Co.*:—99 E. C. L. R. p. 239, *Brogden vs. Llynvi Railway Co.*

(2) See 8 Vic., ch. 20, sec. 68, also sec. 16 of same act:—Appendix to *Wordsworth on Railways*, 68, page 176:—2 *Shelford, Am. Ed.*, page 878.

I do not however think that this objection could have been maintained, even if taken in due season. But, be this as it may, the evidence of record has been adduced without objection, and there certainly is not such a variance between the allegations and the proof as to make the evidence so taken valueless.

Upon the whole I would give the respondent a sum sufficient to show that we admit his right of action ; but I think £12 0 0, is considerably more than the defendants ought to have been condemned to pay—because, as already observed, the damage of which the respondent complains is attributable, partly to the natural situation of his own land, and partly to his own negligence.

There are many cases in which the judgment of the Superior Court ought not to be disturbed on account of a sum so small, as that, in respect of which, I think the judgment now before us, ought to be modified ; but it seems to me that by the judgment now in question, the appellants are made to pay at a *high rate* for the *whole* of damages, the *greater part* of which is attributable to the negligence of the respondent, and the situation of his land—and, besides this, the present is one of a class of cases in which I deem it of special importance that the opinions of the Court should not be misunderstood.

On my part I desire the appellants to know, that the legal pretensions advanced by them in this cause cannot be maintained ; and, on the contrary, that they are liable to pay for damages such as those complained of in the plaintiff's declaration, when really caused by their works ; but at the same time, I feel we ought not to encourage land owners to neglect their drains, and then when they suffer damage from their own negligence, to seek, by litigation, to throw the loss upon others. The judgment of the Court below in my opinion, does, in effect, hold out such encouragement, and therefore, I think, ought not to be confirmed without modification.

Considérant qu'il n'y a pas mal jugé dans le jugement rendu par la Cour de Circuit, siégeant à St. Jean-Port-Joly, comté de l'Islet, district de Montmagny, le 3me jour d'octobre 1862, et dont est appel; confirme le dit jugement, avec dépens, etc.

Dissentientibus, l'Hon. M. le Juge Meredith et l'Hon. M. le Juge Mondelet.

LÉLIEVRE, Q. C., for appellants.

CARON, for respondent.

QUEEN'S BENCH, } DISTRICT OF MONTREAL.
APPEAL SIDE.

Before: — DUVAL, Chief-Justice, MONDELET, BERTHELOT and MONK, Justices.

THE BANK OF MONTREAL..... *Appellants*.

and

MCDONELL *et al*..... *Respondent*.

Held:—10. That by the appointment under a will, of a person named as "residuary legatee," such legatee is seized of the estate of the testator after the death of his executors, and is entitled to recover Bank Stock held in the name of the deceased executors, and also the dividends on such stock.

20. That such residuary legatee is entitled to a judgment for the transmission of the shares, notwithstanding the 17th section of the 19 Vic., cap. 76, the legatee having made a declaration of transmission "as heiress at law, daughter and universal legatee" of her father, and as having from the death of the executors the "further executorship" of the will.

30. That under the 9th clause of the will in question, the plaintiff must be held as having not merely a *life interest* in the estate, but as vested with the right of property therein.

Jugé:—10. Que par l'institution en vertu d'un testament d'une personne comme légataire résiduaire, telle légataire est saisie de la succession du testateur après le décès de ses exécuteurs, et a le droit de recouvrer des actions de Banque tenues aux noms des exécuteurs décédés, ainsi que les dividendes sur telles actions.

20. Que telle légataire résiduaire a droit d'obtenir jugement pour la transmission de telles actions, nonobstant la 17me section de la 19 Vic., chap. 76, la légataire ayant fait une déclaration, "comme héritière, fille et légataire universelle" de son père, et comme étant en possession depuis le décès des dits exécuteurs de l'exécution ultérieure du testament.

30. Qu'en vertu de la 9me clause du testament en question, la demanderesse devait être considérée comme ayant non-seulement un droit d'usufruit dans la succession, mais aussi un droit de propriété en icelle.

Judgment rendered the 9th March, 1864.

This was an action brought by Ann McDonell, the daughter, and Ann Cameron, the widow of the late Allan

McDonell, to compel the transmission to Ann McDonell of fifty-three shares of stock in the Bank of Montreal, standing in the Bank Register in the names of Sir George Simpson and Duncan Finlayson, executors of the will of Allan McDonell, and for the amounts of dividends payable on the 1st December, 1862.

By the last will of Allan McDonell, dated 31st May, 1859, (with a codicil of 31st May, 1859, which does not affect the present case) the testator directed his debts to be paid, made several special legacies, and bequeathed to his wife, during her life, an annuity of two hundred pounds, to be secured out of the residue of his estate, and further the right to occupy during her life the house in which he lived, situate on the mountain in the city of Montreal. He then went on to will as follows :

“ Ninth.—I will and bequeath the said house, lands and premises, in the said City of Montreal, and also all my household furniture, plate, plated-ware, horses and carriages (subject, nevertheless, to the bequests contained in the eighth clause of my will), to my daughter Ann, and her lawful heirs, as her and their own sole and absolute property and effects for ever, and to be by her owned, possessed and enjoyed as her own property, free from marital control ; on the express condition that the same be exempted, and in no way held liable for the debts of herself or any husband whom she may marry, and that they shall be appropriated for her maintenance and support, and be altogether insaisissables, hereby constituting my said daughter my residuary legatee.”

“ Eleventh.—I name as my Executors and Trustees, for all and every the purposes hereinbefore mentioned, Sir George Simpson, of Lachine, &c., and Duncan Finlayson, of the same place, Esquire, and the survivor of them : and I do will and desire that, for the payment of the annuities and legacies hereinbefore mentioned, and for the proper securing the several sum and sums of money hereinbefore disposed of, they do get in and dispose of all or so much of

my estate and effects as they deem best ; and I do hereby expressly continue the powers and authority of my Executors beyond the year and day limited by the law of Lower Canada, and expressly give them power to sell all my real estate of which I may die possessed, except that hereinbefore specially bequeathed, any law, usage or custom to the contrary, notwithstanding ; willing and directing that all and every their powers and authority shall continue until the final accomplishment of this my last will and testament ; and I do confer on my Executors and Trustees the fullest and most ample powers which can, by law, be conferred on or exercised by Trustees. ”

Shortly after the testator's death, which took place on the 16th June, 1859, Sir George Simpson and Mr. Finlayson proved his will and made an inventory of the estate. By that inventory there appeared to be in the testator's estate 83 shares of the stock of the Bank of Montreal, and these were afterwards transmitted, or transferred, in the Register of the Bank, from the name of the testator to that of his Executors.

Sir George Simpson died in 1860, and Mr. Finlayson afterwards acted alone, until he died in July, 1862, when there remained in the names of the two Executors 53 of the testator's 83 shares of the Bank of Montreal stock.

Ann McDonell claimed these 53 shares, as appears by a paper filed at *Enquête*, and in February, 1863, made declaration to the Bank, demanding that the shares should be transmitted to her as heiress at law (daughter), and universal legatee of her father.

As the Bank did not recognize her rights, the action was instituted to compel the appellants to *transmit* to Ann McDonell, one of the respondents, and the widow having an annuity and usufructuary rights, joined with her daughter, Ann McDonell, in the action. In the declaration against the Bank, the respondents alleged, among other things, that

" all the trusts and duties which were imposed upon the said Simpson and Finlayson, as executors, or otherwise, have been executed, all particular legacies and all debts paid ; the legacies to his widow and those to his sons have all been taken by the said widow and sons respectively in lieu of all other rights, and the sons have accepted them waiving all heirship rights whatever, and those sons and the plaintiff Ann McDonell were and are the only children of the testator ; " and " that said 53 shares formed and form part of the residue of the estate of the said late Allan McDonell ; " Ann Cameron for herself declared she ratified the will of Allan McDonell, and both alleged that Ann McDonell was entitled to have the 53 shares in question transmitted, to her ; and the dividends \$424, paid to her ; they concluded accordingly.

By their first plea the appellants admitted all the facts mentioned in the plaintiff's declaration as " leading facts " to be true ; but they alleged that the action could not be maintained, because the testator by the eighth and ninth clauses of his will had willed as therein stated, and by the eleventh had named Sir George Simpson and Duncan Finlayson his executors and trustees, as appeared by the said will ; that after the testator's death his eighty-three shares in the Bank of Montreal were, by a declaration of transmission made in accordance with the 17th section of the 19th Vic., cap. 76, duly transmitted to the names of the executors and trustees ; that neither of those executors and trustees had died intestate, but that each had made a will and appointed executors in Canada ; that at the death of Mr. Finlayson, the survivor of the executors and trustees, he was possessed of 53 of the said 83 shares, and his executors were bound to account for them, not to the respondents, but to the residuary legatee, or other, the legal representative of the testator under his will ; that the appellants did not know, and could not legally be held or bound to know, whether the said 53 shares and the dividend thereon did or did not form the residue of the testator's estate to which the said Ann

McDonell might, as his residuary legatee, be entitled ; and that without a declaration of transmission made by her as residuary legatee in accordance with the aforesaid section of the appellants' charter, the appellants could not be legally held or bound to transmit the said shares, or allow them to be transmitted in their books from the names of the executors and trustees, to the name of Ann McDonell, as the testator's residuary legatee, or to pay her the dividend thereon ;—a *défense au fonds en fait* followed.

The evidence adduced by the plaintiffs consisted of the will and codicil of Allan McDonell ; the inventory ; a copy of an account by Sir G. Simpson and D. Finlayson's executors, proposed to be rendered to the plaintiffs, in which account the residue of Allan McDonell's estate is stated, (including the 53 shares in question) ; a declaration of transmission dated 14th February, 1863, by which Ann McDonell, as heiress at law, daughter, and universal legatee of her father, Allan McDonell, and as having from the death of his executors, any further executorship of his will, claimed in virtue of the 19th Vic., cap. 76, the 53 shares of stock standing in his executors' names, as part of the residue of his estate bequeathed to her ; and, lastly, a receipt *sous seing privé* from Angus C. McDonell, and a notarial release and discharge from the same as curator to John L. McDonell, an absentee, for the special legacies of £100 bequeathed to the former, and £500 bequeathed to the latter, the absentee, by their father, Allan McDonell.

An admission was signed by the defendants by which they admitted service upon them, before action brought, of the petition and declaration of the plaintiff Ann McDonell, dated 14th February, 1863, and vouchers.

On behalf of the appellants there were adduced ; copy of the will of Mr. Finlayson, and the respondents' admission that shortly after Allan McDonell's death, his 83 shares of stock were duly transmitted to the names of Sir George Simpson and Mr. Finlayson, his executors, and in their names,

as such executors, and that 53 of those shares remained at the death of Mr. Finlayson, and had ever since so remained.

The parties having been heard on the merits, the Superior Court, Badgley, Justice, rendered the following judgment on the 30th day of May, 1863 :

“ The Court, &c.—Considering, that by the last will and
 “ testament of the late Allan McDonell, produced in this
 “ cause by the said plaintiffs, and by them mentioned and
 “ referred to in their declaration in this cause filed, certain
 “ particular legacies were thereby bequeathed, and the said
 “ testator did also thereby bequeath to his wife, to wit :
 “ Ann Cameron, one of the plaintiffs, for and during her
 “ life, the annuity in money and the usufruct of his resi-
 “ dence, in the will mentioned, and did further bequeath to
 “ the said Ann McDonell, the other of the said plaintiffs,
 “ certain effects as stated in the said will, and did thereby
 “ constitute the said Ann McDonell his *residuary legatee*, to
 “ wit, of his the Testator's said estate :

“ And considering, that in and by the said last will, the
 “ said testator did thereby nominate and appoint the late
 “ Sir George Simpson, Knight, and the late Duncan Finlay-
 “ son, esquire, and the survivor of them, to be the execu-
 “ tors and trustees of his said will, for the purposes thereof,
 “ and to carry the same into effect, who did enter upon the
 “ execution of the said will, and the performance of the
 “ said trusts therein mentioned, and did cause an inventory
 “ of the said estate to be duly made by Hunter and col-
 “ league, public notaries, at Montreal aforesaid, bearing
 “ date the sixth day of August, one thousand eight hundred
 “ and fifty-nine, whereby, among other effects and property
 “ of the said testator and of his said estate, there were
 “ eighty-three shares of stock of the Bank of Montreal, the
 “ said defendant, belonging to the said testator :

“ Considering, that subsequently to the assumption of the
 “ said estate by the said executors and trustees, they did

“ obtain a transfer of the said shares to be made to them in
 “ the books of the defendant, to stand in their names as
 “ such executors and trustees, whereof fifty-three shares
 “ still stand in their names, as such executors and trustees :

“ Considering, that previous to the institution of this
 “ action, the said executors and trustees have both deceased,
 “ after having paid the debts and particular legacies of the
 “ said testator, and fulfilled the said trusts of the said will,
 “ save as to the said annuity and usufruct to the said Ann
 “ Cameron :

“ Considering, that the said Ann Cameron hath joined
 “ in this action, and hath in and by the said declaration
 “ declared her satisfaction and confirmation of the said will,
 “ and that the said Ann McDonell, the said other plaintiff,
 “ hath, by law, as sole residuary legatee of the said testator,
 “ *saisine* of the residue of the said estate, including therein
 “ the said fifty-three shares of stock of the Bank of Montreal,
 “ and of the dividend thereon accrued since the decease
 “ aforesaid of the said executors and trustees, and of the
 “ survivor of them, as in the said declaration mentioned,
 “ the said dividend amounting to the sum of four hundred
 “ and twenty-four dollars :

“ Considering, that the said plaintiff, Ann McDonell,
 “ hath by law and by her said *saisine*, and by and with the
 “ consent of the said Ann Cameron, by the latter testified
 “ by her becoming party to the said action with the said
 “ Ann McDonell, a right to be put into possession of the
 “ said fifty-three shares of stock, and of the said sum of
 “ four hundred and twenty-four dollars, standing in the
 “ books of the defendant in the names of the said Execu-
 “ tors and Trustees ;

“ Doth order and adjudge, that the said fifty-three shares
 “ of stock of the said Bank of Montreal be transmitted
 “ from the names of Sir George Simpson and Duncan Fin-
 “ layson, Executors and Trustees as aforesaid, to the name
 “ of the said Ann McDonell, and that the said defendant

“ do record the said transfer to her in the register of share-holders of the said Bank of Montreal ; and further, do pay to the said Ann McDonell the said sum of four hundred and twenty-four dollars, the amount of the said dividend upon the said shares, accrued as aforesaid. ”

GRIFFIN, Q. C., and BETHUNE, Q. C. urged :—1° That the judgment of the Superior Court was erroneous in assuming that by his will, Allan McDonell constituted his daughter his universal legatee, or absolutely his residuary legatee ; that the testator’s intention was to give his daughter only a *life interest* in such residue of his estate as should remain after the regular payment of an annuity of £200 per annum had been secured to his wife, and that that life interest was to be for his daughter’s support, “ to be free from marital control,” and to be “ *insaisissable* : ” 2° That the Court below erroneously assumed that, before their deaths, the executors and trustees, and the survivor of them, had “ paid the debts and particular legacies of the testator, and fulfilled the trusts of the will, save as to the said annuity and usufruct to the said Ann Cameron,” or, in other words, that the special allegation to that effect, contained in the respondents’ declaration, had been proved by them : 3° The Court below erroneously declared in effect, that the respondent, Ann McDonell, is the sole residuary legatee of the testator, and, as such, has had, since the death of the survivor of his executors, by law, the *saisine* of the residue of his estate, including therein the said fifty-three shares of the appellants’ capital-stock, and the dividend accrued thereon ; and that, therefore, with the consent of the other respondent, Ann Cameron, testified by her being a plaintiff in the action, she has a legal right to be put in possession of the said fifty-three shares, and to be paid the dividend thereon, as part of the *residue* of the testator’s estate : 4° The plaintiff’s exhibit by which she prayed for the transmission of the shares to her, was not mentioned in their declaration, and it was insufficient. That by it Ann McDonell claimed the shares as “ heiress at law, daughter,

and universal legatee" of Allan McDonell; now, *aucun ne peut être héritier et légataire d'un défunt ensemble*; there was nothing in the will to show that Ann McDonell was her father's universal legatee, and her right to the "further executorship" of the will might well be called in question, seeing that when no executor is appointed, or when the executorship is renounced, or becomes, by death or otherwise, vacant, the *heir* of the testator has the execution of his will. (1) Ann McDonell was certainly *an* heir of her father, but, as his will disclosed that she had brothers, she was not the *only* heir, and, therefore, she could not, alone, have the "further executorship" of the will.

MACKAY, for respondents.—The testator expressly makes his daughter Ann, his residuary legatee, unqualifiedly. It is impossible to conceive a residue that does not involve an universality. Ann McDonell is universal legatee of her father. (2) She is also his heiress at law. Since the death of the last of the executors she has had by law the *saisine* of the testator's estate. The only person having possible adverse interests joins in the action, consenting that judgment pass in favor of Ann, the universal legatee. The executors never had but a qualified *saisine*; their possession was for the heir. (3) The *saisine legale* always was in the heir. (4) After the death of Finlayson, total *saisine* was in the heirs, and anything further of executorship that remained to be done was for the heirs to do. (5)

Aucun ne peut être héritier et légataire ensemble," says the Bank; but the article of the custom shows the reason of that rule, reason which has, long ago, ceased. There is not incompatibility in Lower Canada now. (6)

(1) Pothier, Don. Test., ch. 5, p. 359, 1ère part.:—7 Guyot, Rep. de Jur., vbo. Exr. Test., p. 158:—8 Nouv. Den., vbo. Exr. Test., p. 209, Nos. 2 et 4:—4 Furgole, des Testaments, ch. 10, s. 4, p. 162, No. 43.

(2) Dalloz, Rec. Per., 1841, 1ère part., p. 159:—Ibid., 1851, 2d part., pp., 99, 100:—Ibid., 1855, 1ère part., p. 73.

(3) Pothier, Cout. d'Orl., p. 568, quarto.

(4) Ib., pp. 528, 529 quarto. Nos. 121, 125.

(5) Pothier, Cout. d'Orl., p. 569.

(6) See art. 42, of the Cust. by Valin:—3 Cochin, octavo ed., p. 246.

The question now is interesting only in regulating successions and *communautés*. What is taken *à titre de légataire* makes *acquêts* unless the *legs* be by an ascendant. If a person be heir and legatee of a collateral, and take in quality of heir he makes *propres*, but if of legatee, he makes *acquêts*. As it is more interesting to have two titles than one, Miss McDonell stated two, in her petition and declaration to the Bank. But supposing there was incompatibility in Miss McDonell calling herself heiress and legatee, the Bank cannot oppose it. (1) "Miss McDonell was not the only heir," says the Bank. To this the respondents say, the others have taken their particular legacies, and do not show themselves. So long as they do not show themselves. So long as they do not come forward, as *héritiers acceptants*, Miss McDonell is free to act; and, though only one heir, may be awarded the totality of the succession. (2)

"The plaintiff's exhibit marked A was not mentioned in their declaration; it ought to have been recited," says the Bank.—But the Bank consented to the filing of that exhibit, and admitted service of it upon it before action; now after judgment it would, as it were, arrest judgment, although aware that after a verdict the judges will do what they can to help the declaration. (3) Again, the Bank charter, 19 Vic., only enacts two things against stockholders, so long as their declaration of transmission is not served and authenticated: 1o. no profits are to be received by such stockholders: 2o. such persons shall not vote. In the present case, before the Bank was ordered to pay, proof had been made, by its own admission of service before action, of Miss McDonell's declaration of transmission. No profits of the Bank are to be paid to Miss McDonell before transmission authenticated by her declaration in writing, left

(1) Merlin, Rep., vbo. Héritier, sec. 10, art. 4 :—Cochin, p. 619, vol. 36, octavo, 39th cause of old Edn.

(2) 2 Proudhon, Usufruit, p. 149, Dct. d'Usage :—Simonne, Saisine Héred., p. 117, note.

(3) 2 Barr., p. 900.

with the Bank, before action ; in compliance with the 19 Vic.—The Bank is without a grievance.

MONDELET, *dissenting*. Stated that the action was brought to obtain a transfer of 53 shares of stock in the Bank of Montreal, by Ann McDonell, calling herself universal residuary legatee.—Now there were several other heirs, and she was but one of several universal legatees ; there being no proof of renunciation by any of them. He would therefore be for the dismissal of the action.

DUVAL, Chief-Justice.—The special clause in the Bank charter had been set up, but it was difficult to see for what good reason. It was evident the plaintiff was “ residuary legatee,” what was that but *universal* residuary legatee.—The residuum was hers.—It was urged that she should have taken her recourse against the executors of the executors, but this was strange doctrine to be held under the law of this country. He could not see any reason for contesting the plaintiff’s claim, and the judgment below must be confirmed with costs.

Judgment confirmed.

The appellants obtained leave to appeal to the Privy Council.

GRIFFIN, Q. C., for appellants.

BETHUNE, Q. C. Counsel.

McKAY and AUSTIN, for respondents.

QUEEN'S BENCH, }
 APPEAL SIDE. } DISTRICT OF MONTREAL.

Before :—DUVAL, Chief-Justice, MEREDITH, MONDELET and
 MONK, Justices.

GRANT.....:..... *Appellant,*
 and

THE EQUITABLE FIRE INSURANCE COMPANY. *Respondents.*

Held :—That, in the case submitted, there was an express guarantee that the steamer insured should navigate, and that the insurers were not answerable for the loss suffered by the burning of the boat while kept lying in a dock.

Jugé :—Que, dans l'espèce, il y avait garantie expresse que le bateau à vapeur assuré serait employé à naviguer, et que les assureurs n'étaient pas tenus de dommages causés par l'incendie du bateau, pendant qu'il était dans un bassin.

Judgment rendered the 1st June, 1864.

MEREDITH, Justice.—At the argument, and before I had an opportunity of fully considering the terms of the policy, I was under the impression that, in principle, this case was the same as *Grant vs. The Ætna Insurance Company*; (1) and if it were so, it would, doubtless be our duty, in disposing of it, to be guided by the judgment of the Privy Council in that case. But after carefully considering the two policies, it appears to me that there is a material difference between them, and that according to the doctrine laid down in *Grant vs. The Ætna Company*, the judgment now under our consideration ought to be confirmed.

In the *Ætna* case the policy of Insurance described the *Malakoff* as “now lying in Tate’s dock, Montreal, and intended to navigate the St. Lawrence and Lakes, from Hamilton to Quebec, principally as a freight boat, and to be laid up for the winter in a place to be approved by this company.”

The Lords of the Privy Council decided that the words of that policy did not imply a contract to navigate—and that as the appellant did not, after the date of the policy, remove

(1) 11 L. C. Rep., pp. 128, 330 :—and vol. 12, p. 386.

the boat for the purpose of navigation, he was not bound to cause her "to be laid up for winter in a place to be approved of by the company;" and they therefore held, although the boat was not laid up for winter in a place approved of by the Company, (as we thought the policy required) that the insurers were liable for the loss. But with reference to the words of the policy respecting the navigation of the boat their Lordships observed: "If they import an agreement that the ship shall navigate in the manner described in the policy—they must be considered a warranty—and the engagement not having been performed, whether the engagement *was material or not material*, the insurers are discharged."

Their Lordships, in the portion of their judgment just cited, spoke of a warranty with respect to something to be done; but the rule would be the same with respect to the warranty of a fact as existing. (1)

In the present case the steamer is described, in the policy, dated the 5th August, 1858, and covering the period from the 30th day of June, 1858, until the 30th day of June, 1859, as follows, "The steamer *Malakoff* (now in Tate's Dock, Montreal), navigating the river St. Lawrence between Quebec and Hamilton, stopping at intermediate ports;" and the answer of the jury to the question: "Was the steamer *Malakoff* on the 30th day of June, 1858, or at any other period between that date and the 30th day of June, 1859, navigating the St. Lawrence between Quebec and Hamilton?" is simply "no."

Here then we have an unqualified negation by the jury of a fact, affirmed in the Policy, and therefore according to the doctrine laid down in *Grant vs. the Ætna* "whether the engagement" (or, in this case, the fact affirmed), be material or not material, the insurers are discharged; that is, provided my view of the meaning of the policy be right.

Under our law it might perhaps be sufficient, if the fact

(1) 1 Arnould, § 214, p. 584:—1 Phillips, No. 762, p. 430, and cases cited.

affirmed in the policy, were substantially true. (1) Whereas, the law of England requires the facts affirmed in a policy to be literally true. (2) But as the statement in the present case, as I view it, was not true, either literally or substantially, it is not necessary to determine whether in this respect there is any difference between our law and the law of England.

On the part of the appellant, however, it is contended that the policy must be understood as meaning that the steamer was then in dock, and *intended to navigate*; but I agree with the learned Judge of the Superior Court in thinking that this view cannot be adopted. The description: "The steamer Malakoff navigating the river St. Lawrence, between Quebec and Hamilton, stopping at intermediate ports" is clear, and hardly, it seems to me, admits of two meanings—and the words "now in Tate's Dock, Montreal" inserted parenthetically cannot be allowed to negative or neutralize the sense of the main body of the sentence; they simply add a circumstance tending to identify the boat, and to establish where she happened to be when the description was given. As observed by M. Justice Badgley, the words "now in Tate's Dock" in brackets, are only incidental to the main action of the steamer, "navigating the St. Lawrence and stopping at intermediate ports."

I do not fail to bear in mind that the Jurors have also found that the policy was not issued by the defendants, at a lower rate of premium than would have been exacted by the defendants if they had known that the Malakoff was not navigating the Saint Lawrence, but was *laid up* in Tate's Dock.

(1) Emerigon, chap. 6, sec. 3:—Boulay Paty, Ed. of 1827, vol. 1, pp. 163-4:—Boudousquid, No. 108, p. 137.

(2) "The distinction according to English law between a warranty and a representation being, that a representation may be satisfied with a substantial and equitable compliance, whereas a warranty requires a strict and literal fulfilment, i. e., what it avers must be *literally true*, what it promises must be exactly performed."—Arnould, vol. 2, 587, and authorities there cited:—1st Phillips, No. 162, page 430.

But in my opinion that matter ought not to have been submitted to the jury. The policy shows the contract between the parties, and the construction of the contract is for the Court, and not for the jury. It is, perhaps, true that the risk from fire may not be greater to a steamer in dock, than to a steamer actually navigating—if *equal care be taken of the two*. But a vessel *employed*, is generally a source of profit; whereas a vessel *lying idle*, is usually a cause of expense. And an Insurance Company might therefore reasonably presume that a boat yielding profit, would be more likely to be taken care of than a boat causing loss.

But, be this as it may, by the policy, as I read it, the defendants insured a boat “navigating the St. Lawrence,” whereas the boat, in truth, then was *not navigating* the St. Lawrence, but was laid up in dock, during, it is to be observed, the season of navigation.

The main risk, according to the policy, was the risk incident to the *use* of the boat *on the river*, whereas the risk, in reality, was that caused by the boat then being *not in use*, and therefore *not in the river*.

•The respondents, therefore, by the policy of Insurance did not assume the risk to which the appellant attempts to subject them, and consequently they cannot be held liable.

Before leaving this branch of the case I may observe, that although the respondent has drawn our attention to the statements of the witnesses before the jury, I have not thought it right to advert to that proof, because, notwithstanding the changes in our law on this subject, I am of opinion that, on an application such as the present, we are bound by the finding of the jury, as to any facts properly submitted to them.

The object of the Legislature in requiring a special verdict to be returned, upon questions of fact defined by a Judge was, I think, to prevent the jurors from encroaching upon the Province of the Court; but there is nothing in the

Statute to show that the Legislature intended to transfer the finding of the facts from the jury to the Judge ; which could not be done without subverting the system of trial by jury.

I now pass to the consideration of a question which this case presents, and upon which, although argued in *Grant vs. The Ætna Company*, the Lords of the Privy Council found it unnecessary to pronounce a decision, namely :—Is it competent to a defendant in a suit, to move for judgment *non obstante veredicto* ? On this subject, Archbold (1) says : “ It seems that the defendant cannot in any case obtain judgment *non obstante veredicto*, however insufficient the plaintiff’s pleading may be—and that his proper course is “ to move in arrest of judgment. ”

The only authority cited by Archbold in support of this doctrine is the case of *Rand and Vaughan*, (2) in which Chief Justice Tindal, in adjudicating upon a motion made by a defendant for judgment *non obstante veredicto*, said : “ The motion would perhaps have been more correct in point of form, if it had been a motion to arrest the judgment for the plaintiff on the ground that enough still remains upon the defendant’s special plea, confessed by the plaintiff’s replication, to bar the plaintiff’s demand ; for we are not aware that any instance can be produced where the defendant, after an issue which he has taken has been found against him, has been allowed to have judgment entered in his own favor, *non obstante*. ” Nine years afterwards, the case of *Rand and Vaughan* having been cited in the Exchequer-Chamber, as shewing that “ Tindal, Chief-Justice, thought that a defendant after verdict against him could not have judgment entered in his favor “ *non obstante*. ”—The learned Chief-Justice observed “ I said only that the Court was not aware of any instance. ” (3)

This much however is certain that, even in England,

(1) Archbold, 1108.

(2) 1 Bingham, N. C. 767.

(3) 6 Adolphus and Ellis, N. S., 704.

there are some cases in which a defendant may move for judgment *non obstante veredicto*—for instance, in the case of the Queen vs. The Governor of the Darlington Free Grammar School, 6 Ad. and El. N. S. 682, which however, it is proper to observe, was a case of *mandamus*—under the Statute 9 Anne, ch. 20, sec. 2—a verdict having been found for the Crown on all the issues, the Court of Queen's Bench gave judgment for the defendants *non obstante veredicto*—and the judgment so given was afterwards affirmed in the Exchequer Chamber.

That case, as I have already observed, was a case of *mandamus*; but after carefully considering the report, I think that the reasons given, in that case, for allowing the defendant to move for judgment in his favour, *non obstante veredicto*, could, *under our system*, be urged by a defendant in any ordinary case. Moreover, it may be inferred from the observations made by Baron Parke, (now Lord Wensleydale) in the case just cited, that he did not admit the doctrine that a defendant in an ordinary case could not make a motion such as that under consideration.

At one stage of the argument Baron Parke remarked: "If a plaintiff by a bad replication confesses, and does not avoid the matter pleaded, I cannot see why there should not be judgment *non obstante veredicto*, as well as where a defendant makes a default in his plea." And in answer to the question put by Baron Parke: "Is there any authority for saying that that (namely, the principle that where there is an express confession, but no avoidance, judgment shall be given for the opposite party) does not apply to the plaintiff's as well as the defendant's pleading?" The Counsel for the plaintiff admitted. "No instance appears in which it has been so held."

The observations of Baron Parke in the case just referred to are deserving of particular attention, not only on account of the great learning and experience of the Judge by whom they were made, but also on account of the subject having

been fully considered by him, in consequence of the questions submitted to the Judges, by the House of Lords, sometime previously in the case of *Gwynne vs. Burnell*. (1)

It may also be observed that in the course of the argument to which I have adverted, no observations opposed to the doctrine which Baron Parke seemed inclined to adopt, were made by any of the Judges; and when the judgment was rendered, the Court pronounced no opinion upon the question—whether in ordinary actions the defendant is entitled to a judgment in his favour *non obstante veredicto*.

I may add that in the English reports up to 1861, within my reach, I have not found any case formally deciding the question under consideration. I therefore am inclined to think that the English practice, as to the right of a defendant to a judgment *non obstante veredicto*, cannot be considered authoritatively settled; whereas the Canadian practice has been settled by several judgments—and even if the English practice were certain, and well established, it would not, it is plain, be binding upon us, the systems of law, of pleading, and of procedure generally, in the two countries, being wholly different.

Independently of the authority of decided cases, it appears to me that our Canadian practice upon this point is reasonable.

In order to justify a Court in rendering judgment *non obstante veredicto*, two things must, it seems, concur:—first, the facts established by the verdict must be insufficient to warrant a judgment in favor of the party obtaining the verdict; and, secondly, the record must show that facts have been confessed or admitted, which justify a judgment against the party in whose favor the verdict was rendered. When such is the state of the Record, the Court may well treat as nugatory the verdict establishing the immaterial facts, and render judgment upon the material facts admitted or confessed.

(1) 6 Bingham, N. C., 453.

Under our system, the parties in a suit are upon a footing of exact equality ; neither party, at any stage of the proceedings, is considered as exclusively *dominus litis* ; and therefore, as we hold that a plaintiff, having in his favor an admission or confession of the material facts, is entitled to a judgment against the defendant, although he may have obtained a verdict in his favor as to immaterial facts, we also hold, that where the defendant has in his favor an admission or confession of facts, establishing a good defence, he is entitled to judgment against the plaintiff, although he may have a verdict in his favor upon facts that are unimportant.

With reference to the case before us, I must say it appears to me questionable whether, considering all the answers of the jurors, and more particularly their answer to the 7th question, it was necessary to style the motion for judgment as being *non obstante veredicto* ; but no objection has been raised to the form of the defendant's motion, and I do not think it a matter of importance. Upon the whole, I view the case in the same light in which it appears to have been regarded by Mr. Justice Badgley, in the Superior Court, and therefore think the judgment appealed from ought to be confirmed.

MONDELET, Justice.—It appears to me that the wording of the Policy of Insurance effected through George Tate, the plaintiff's agent, on the 5th August, 1858, to take effect one year from the 30th July previous, is so plainly expressed as to leave no doubt in the mind. The words are " on the hull and joiner work of the Steamer *Malakoff* (now in Tate's dock, Montreal) navigating the river St. Lawrence, between Quebec and Hamilton, stopping at the intermediate ports, including outfitting in the spring, two thousand four hundred dollars ; on the engine therein, one thousand six hundred dollars, *es per* application No. 17,783."

I shall abstain from making any lengthy remarks, which would be but a repetition of what has already been said by some of my brother Judges. It will suffice for me to

observe, that if words are intended to be used for the purpose of conveying one's meaning, surely the words "navigating the river St. Lawrence" must and do mean, that the steamer then in the dock, is not to remain there, but *is to be used* in navigating the river St. Lawrence. If the words do not mean that, then it must be said that they are used to convey the very reverse of their natural and grammatical meaning.

As to the risk, it is manifest, not only from the evidence, but from the very nature of things, that a vessel in dock is, from the surrounding objects, in greater danger of fire, than when, in the course of navigation, proper precautions are taken against fire, day and night.

Upon the whole, I am of opinion that the plaintiff had no right to call upon defendants for the payment of his insurance, he having by his non conforming to the policy and contrary to his declaration that the steamer was navigating the waters of the St. Lawrence, placed himself in a position such, that he must bear his loss and not the company. The judgment of the Court below, should, therefore, be confirmed.

Judgment :—The Court having heard the parties by their counsel upon the motion of the defendant of the 18th day of April, 1863, that inasmuch as there was and is in the policy of insurance declared upon by the plaintiff an express condition and warranty that the said steamer *Malakoff* was navigating, and did and should continue to navigate, the river St. Lawrence between Quebec and Hamilton, stopping at the intermediate ports, to wit : during the seasons of navigation while the said policy should remain in force, and it appears and is admitted, in and by the written admission of the plaintiff, that the said condition and warranty was not complied with, and that in fact the said steamer always remained in Tate's dock, and was not navigating, and did not navigate ; and that inasmuch as the evidence adduced at the trial had in this cause, proved material misrepresentation and concealment by the plaintiff in his application for said policy, that in consequence of the facts

set forth in the said motion, and notwithstanding the verdict rendered by the jury in this cause in favor of the plaintiff, judgment be entered up in favor of the defendants, and by such judgment it be declared that the said policy, in consequence of such breach of the said condition and warranty, was and is null and void, and the same be set aside, and the action of the plaintiff be hence dismissed with costs; having examined the proceedings and record in this cause, and seen and examined the admissions respectively filed by the parties, and the findings and verdict of the said jury, and deliberated :

Considering that the declaration of the said plaintiff in the said policy of insurance upon which this present action was brought, and enunciated in the following words : "on the following property owned by assured, namely, on the hull and joiner work of the steamer *Malakoff* (now in Tate's dock, Montreal,) navigating the river St. Lawrence between Quebec and Hamilton, stopping at the intermediate ports, including outfitting in the spring," contains an express condition and warranty upon and for the said steamer *Malakoff* mentioned in and insured by said policy, and mentioned in the said declaration in this cause filed, and was a condition of the said policy to be kept and observed; and considering that it is admitted by the plaintiff in and by his admissions filed in this cause, that the said condition and warranty was not complied with, and that the said steamer was not navigating as aforesaid, and did not navigate at any time in and from the effecting of the said insurance until the destruction thereof by fire, as stated in the said declaration of the plaintiff, and always remained in Tate's dock; and further considering that the action and *demande* of the said plaintiff in this case was unfounded in law, doth, notwithstanding the said verdict, grant the said motion of the defendants that the action of the plaintiff in this behalf be dismissed, with costs, and in consequence the plaintiff's action and *demande* is hence dismissed with costs

MACKAY and AUSTIN, for appellant.

TORRANCE and MORRIS, for respondents.

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OF THE

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1. Held:—That a perpetual exception alleging that the plaintiff knew, at the time of the execution of the lease of a house, that the defendant intended to keep a house of ill-fame in it, is not an answer to an action in ejectment, founded upon an allegation that the defendant occupied the house for unlawful purposes; and such exception will be rejected on demurrer.

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Jugé:—Qu'une exception perpétuelle alléguant que le demandeur savait, lors de l'exécution du bail d'une maison, que le défendeur entendait y tenir une maison déréglée, n'est pas une réponse à une action en *ejectment*, fondée sur ce que le défendeur occupait la maison pour des fins illicites; et telle exception sera rejetée sur une défense au fonds en droit.

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Réintégrandes.—Partage.

2. Held:—That in the partition of a fief, with condition that the revenue of a mill built upon the share of one of the co-partitioners should be divided according to their respective shares, until the proprietor of the ground should have reimbursed to his co-partitioner the value of his share in the said mill; the latter has a right of action to be put in possession of his right to receive his share of the revenues of the said mill, the proprietor of the ground having failed to repay him the value of his share of such mill.

Lefebvre de Bellefeuille and Globensky.

Jugé:—Que dans un partage de fief, avec stipulation que les revenus d'un moulin construit sur la part d'un des co-partageants se partageraient suivant leurs parts respectives, jusqu'à ce que le propriétaire du fonds eût remboursé à son co-partageant la valeur de sa part dans le dit moulin; ce dernier a droit de réintégrandes pour être remis en possession de son droit de percevoir sa part des revenus du dit moulin, le propriétaire du fonds ne lui ayant pas remboursé la valeur de sa part de tel moulin.

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Resiliation.—Subletting.

3. Held.—10. That where a lease of certain shops and premises contains a condition that the tenant shall not transfer his right in the lease, without the consent in writing of the

Jugé:—10. Que dans le cas d'un bail de certains magasins et dépendances avec condition que le locataire ne cédera pas son droit au dit bail, sans le consentement par

lessor, a lease of a portion of the premises with a reserve of two rooms by the sublessor, is not a breach of the condition which can give rise to a rescission of the original lease.

20. That where such sub-lease was made with the knowledge of the original lessor, who received the rent from the original lessee, without any objection as to the subletting, a sufficient consent to such subletting is to be inferred, and the action *en résiliation* will be dismissed.

Persillier dit Lachapelle vs. Moretti.

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AFFIDAVIT.—CAPIAS.

1. Held.—That an affidavit for *capias* by one of several legatees setting up a debt due to himself exceeding £10, currency, and also a debt due to each of his co-plaintiffs, likewise exceeding £10, currency, in an action for the whole amount due, will be set aside and the *capias* quashed *in toto*, the deponent not appearing to act as the agent, or legal attorney of the other legatees, his co-plaintiffs.

écrit du bailleur, le bail de partie des lieux avec réserve de deux chambres par le sous-bailleur, n'est pas une violation de la condition qui peut donner lieu à la résiliation du bail principal.

20. Que lorsque le sous-bail est à la connaissance du locateur principal, qui a reçu les loyers de son locataire, sans objection au sous-bail, le consentement du locateur à tel sous-bail sera présumé, et l'action en résiliation sera renvoyée.

Jugé :—Qu'un affidavit pour *capias* par l'un de plusieurs légataires alléguant une dette à lui due excédant dix livres, courant, et aussi une dette due à chacun de ses co-demandeurs, excédant de même dix livres, courant, dans une action pour tout le montant; sera mis de côté et le *capias* annulé, *quashed in toto*, le déposant ne paraissant pas agir comme l'agent, ou le procureur légal des autres légataires, ses co-demandeurs.

Bourassa vs. Brousseau.

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Capias.

2. Held.—10. That in an affidavit for *capias* the debt is sufficiently set forth by stating that the defendant is indebted to the plaintiff in the sum of £39, without stating the cause of debt, or the place where it was contracted.

20. That the grounds of deponent's belief are sufficiently set forth by a statement in the affidavit to the effect that the defendant stated to deponent, at a time and place mentioned, that he was about to go to California, one of the United States of America, to make money, and asked the deponent to procure him money for the voyage, and by afterwards making the same statements to persons named in the affidavit.

Jugé :—10. Que dans un affidavit pour *capias* la dette est suffisamment énoncée s'il est dit que le défendeur est endetté envers le demandeur en une somme de £39, sans indiquer la cause de la dette ou l'endroit où elle a été contractée.

20. Que les raisons de croire du déposant sont suffisamment énoncées par une allégation dans l'affidavit à l'effet que le défendeur avait dit au déposant, dans un endroit et à une époque indiqués, qu'il était sur le point d'aller en Californie, un des États-Unis de l'Amérique, pour y faire de l'argent, et avait requis le déposant de lui procurer de l'argent pour le voyage, et en répétant cet avancé à d'autres personnes nommées dans l'affidavit.

Debien vs. Marsant dit Lapierre.

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Jurat.

3. Held:—That in the case of an affidavit to obtain a *saisie-arrest* before judgment, the prothonotary must state in the jurat that the affidavit was sworn to before him.

Jugé:—Que dans le cas d'un affidavit pour obtenir une saisie-arrest avant jugement, le protonotaire dans son certificat d'affirmation doit déclarer que le serment a été prêté devant lui.

Heugh and Ross.

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Saisie-arrest.

4. Held:—That in an affidavit for a *saisie-arrest* before judgment, the deponent must swear that he is credibly informed, has every reason to believe and doth verily and in his conscience believe, that the defendant is now immediately about to depart, &c.; and that the form of affidavit given in the statute must be strictly followed, *sous peine de nullité*.

Jugé:—Que dans un affidavit pour saisie-arrest avant jugement, le déposant doit jurer qu'il est informé d'une manière croyable, a toute raison de croire et croit vraiment en sa conscience, que le défendeur est sur le point de laisser, &c.; et que la formule du statut doit être strictement suivie, sous peine de nullité.

Jobin vs. Symmons.

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Saisie-arrest.—Pleadings.

5. Held:—That an affidavit for a writ of *saisie-arrest* before judgment, and the writ itself, may be attacked by an *exception à la forme*.

Jugé:—Qu'un affidavit pour un writ de saisie-arrest avant jugement, et le writ même, peuvent être attaqués par une exception à la forme.

Giroux vs. Gareau.

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AGRICULTURAL ACT.—*Vide* DAMAGES.ALIMENTARY ALLOWANCE.—*Vide* ASSIGNMENT.

ALIMENTARY ALLOWANCE.—CIRCUIT COURT.—JURISDICTION.

Held:—That the Circuit Court has no jurisdiction in an action for an alimentary allowance of \$200, per annum, sought to be recovered for an indefinite period, namely, during the plaintiff's life time; and that the judgment of the Circuit Court awarding £28, per annum, during the plaintiff's life, will be reversed, and the plaintiff's action dismissed.

Jugé:—Que la Cour de Circuit n'a pas jurisdiction dans une action pour aliments au montant de \$200, par année, réclamés pour une période indéterminée, savoir, pendant la vie durante de la demanderesse et que le jugement de la Cour de Circuit accordant £28, par année, la vie durante de la demanderesse, sera infirmé, et l'action de la demanderesse renvoyée.

Smith and Patton.

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AMENDED RECORD.—*Vide* WRIT OF ERROR.

AMEUBLISSEMENT.—CONTRAT DE MARIAGE.—HYPOTHEQUE.

Held:—1o. That the *ameublisement général* stipulated by the father and mother of their minor daughter, in a contract of marriage, is valid.

Jugé:—1o. Que l'ameublisement général stipulé par les père et mère de la mineure, en un contrat de mariage, est valable.

20. That every thing inherited by the wife from her father and mother, and all by them given to be *conquet* of the community, is entirely subject to the disposal of the husband, who may legally sell or hypothecate it.

30. That upon dissolution of the community, and in virtue of a covenant of *reprise d'apport*, the wife is not entitled to claim that which she has got from her father and mother by inheritance or gift, except subject to the mortgages which the husband may have created thereon, as the head of the community.

David vs. Gagnon and The Trust and Loan Company of Upper Canada.

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APPEALS.—*Vide* CERTIORARI.—JURISDICTION.—MUNICIPAL COUNCILS.

ARCHITECTS.—*Vide* DAMAGES.

ARTICULATION OF FACTS.—*Vide* CONTRACT FOR WORK AND LABOR.—FIXTURES.

ARTICULATION OF FACTS.

Held:—That a motion to reject an articulation of facts, must be presented at *enquête*.

The Quebec Bank vs. Rolland.

20. Que tout ce qui échoit à la femme de la succession de ses père et mère, et tout ce qui est donné par eux pour être conquet de la communauté, est entièrement à la disposition du mari, qui peut le vendre ou l'hypothéquer légalement.

30. Que sur dissolution de la communauté, et en vertu d'une stipulation de reprise d'apport, la femme ne peut reprendre ce qui a pu lui advenir de ses père et mère par succession ou donation, qu'à la charge des hypothèques que le mari y a imposées comme chef de la communauté.

Jugé:—Qu'une motion pour rejeter une articulation de faits, doit être présentée à l'enquête.

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ASSIGNEE.—*Vide* HYPOTHECARY ACTION.

ASSIGNMENT.—ACCEPTATION.—RATIFICATION.

1. Held:—That the assignment of a debt accepted by the notary, in the name of the assignee, is sufficiently ratified and perfected by the signification which is made in the name of such assignee, and takes effect from the day of such notification.

Perrault and The Ontario Bank.

Jugé:—Qu'un transport de créance accepté par le notaire, au nom du cessionnaire, est suffisamment ratifié et parfait par la signification qui en est faite au nom du cessionnaire, et sort son effet du jour de cette signification.

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Fraud.—Return of Writ.—Examination of Witnesses.—Alimentary Allowance.

2. The defendant, a merchant resident in U. C., made an assignment of all his property, effects and debts to one of his creditors in trust for the other creditors, and went to the United States, where he resided for some years, and then returned to his previous domicile in Upper Canada, and was afterwards ar-

Le défendeur, un marchand résidant dans le H. C., fit transport de toutes ses propriétés, dettes et effets à l'un de ses créanciers pour l'avantage des autres, et se rendit aux Etats-Unis, où il résida pendant quelques années, et revint ensuite à son premier domicile dans le H. C., il fut ensuite arrêté à Montréal. La

rested in Montreal. The grounds of fraud alleged in the affidavit were, that the defendant had absconded from the Province and had fraudulently disposed of all his property and effects. The defendant filed a petition contesting the grounds set up in the affidavit, and alleged that the assignment was made according to the law of Upper Canada, and in good faith. The plaintiff answered it at the date of the assignment the defendant was notoriously insolvent, and that by the law of Lower Canada, such an assignment was in fraud of his creditors:

Held:—1o. That the assignment could not, in the case submitted, be held to be in fraud of the creditors, and that the arrest was made on insufficient grounds.

2o. That on the petition of the defendant, the Sheriff will be ordered to return the writ before the return day.

3o. That a consent motion will be granted in chambers, in vacation, naming a commissioner in Upper Canada to take the evidence of witnesses residing there.

4o. That the alimentary allowance referred to in the Con. Stat. L. C., cap. 87, sec. 6, will be divided, and that the plaintiff in each case, will be ordered to pay a share according to the number of suits pending under which the defendant is detained.

fraude alléguée dans l'affidavit était, que le défendeur avait quitté la Province, et avait disposé de toutes ses propriétés et effets. Le défendeur produisit une requête contestant les allégations contenues dans l'affidavit, et alléguant que la cession avait été faite suivant la loi du Haut-Canada, et de bonne foi. Le demandeur répondit qu'à l'époque de la cession le défendeur était notoirement insolvable, et que par la loi du Bas-Canada, un pareil transport était en fraude de ses créanciers :

Jugé:—1o. Que le transport ne pouvait, dans l'espèce, être considéré comme fait en fraude des créanciers, et que l'arrestation avait été faite sans cause suffisante.

2o. Que sur requête du défendeur, il sera ordonné au Shérif de faire rapport du writ avant le jour du retour.

3o. Qu'une motion de consentement sera accordée en chambre, en vacance, nommant un commissaire dans le Haut-Canada pour prendre les témoignages de témoins y résidant.

4o. Que l'allocation alimentaire fixée par le Stat. Ref. B. C., cap. 87, sec. 6, sera partagée, et que le demandeur dans chaque cause sera contraint de payer une proportion suivant le nombre d'actions pendantes sur lesquelles le défendeur est détenu.

Moss vs. Wilson.

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BAILIFFS.—*Vide* PRESCRIPTION.

BANK STOCK, TRANSMISSION OF.—RESIDUARY LEGATEE.—WILL.

Held:—1o. That by the appointment under a will, of a person named as "residuary legatee," such legatee is seized of the estate of the testator after the death of his executors, and is entitled to recover Bank Stock held in the name of the deceased executors, and also the dividends on such stock.

2o. That such residuary legatee is entitled to a judgment for the

Jugé:—1o. Que par l'institution en vertu d'un testament d'une personne comme légataire résiduaire, telle légataire est saisie de la succession du testateur après le décès de ses exécuteurs, et a le droit de recouvrer des actions de Banque tenues aux noms des exécuteurs décédés, ainsi que les dividendes sur telles actions.

2o. Que telle légataire résiduaire a droit d'obtenir jugement pour la

transmission of the shares, notwithstanding the 17th section of the 19 Vic., cap. 76, the legatee having made a declaration of transmission "as heiress at law, daughter and "universal legatee" of her father, and as having from the death of the executors the "further executorship" of the will.

30. That under the 9th clause of the will in question, the plaintiff must be held as having not merely a *life interest* in the estate, but as vested with the right of property therein.

The Bank of Montreal and McDonell.

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CANON EMPHYTEOTIQUE.—*Vide* DECRET.

CAPIAS.—*Vide* AFFIDAVIT.—SPECIAL BAIL.

CARPENTERS, LIABILITY OF.—*Vide* DAMAGES.

CARTERS, TARIFF OF CHARGES.

Held:—That the tariff regulating the charges of carters for hire in the City of Quebec, is not in force outside of the City limits.

Amiot dit Larpi nière vs. Bailey.

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CAUSE OF ACTION.—*Vide* JURISDICTION.

CAUSE OF ACTION.—JURISDICTION.

Held:—In an action for goods sold and delivered by a merchant, residing in Montreal, against a defendant, resident in Upper Canada; that the whole cause of action arose in Montreal, although part of the goods were ordered by the defendant by letter dated in Upper Canada, and sent to the plaintiff in Montreal, and part were verbally ordered in Upper Canada from the plaintiff's traveller, who took down the order in writing, and brought or forwarded it to the plaintiff, he having the option of filling it or not; and the goods being held as delivered to the defendant, and at his risk, on delivery to the carrier at Montreal.

transmission de telles actions, non-obstant la 27me section de la 19 Vic., chap. 76, la légataire ayant fait une déclaration, "comme héritière, fille et légataire universelle" de son père, et comme étant en possession depuis le décès des dits exécuteurs de l'exécution ultérieure du testament.

30. Qu'en vertu de la 9me clause du testament en question, la demanderesse devait être considérée comme ayant non-seulement un droit d'usufruit dans la succession, mais aussi un droit de propriété en icelle.

Jugé:—Que le tarif réglant la rémunération des charretiers dans la Cité de Québec, n'a aucune force en dehors des limites de la Cité.

Jugé:— Dans une action pour marchandises vendues et livrées par un marchand résidant à Montréal, contre un marchand résidant dans le Haut-Canada; que toute la cause d'action avait originée à Montréal, quoique partie des effets eût été commandée par le défendeur par lettre datée dans le Haut-Canada, envoyée à Montréal, et partie par ordre verbal du défendeur donné dans le Haut-Canada à un agent du demandeur, qui avait pris la commande en écrit, et l'avait apportée ou transmise au demandeur, qui avait le choix de la remplir ou non; les effets devant être considérées comme livrés au défendeur, et à ses risques, sur remise au commissionnaire à Montréal.

Clark vs. Ritchie.

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CERTIFICATE OF BAPTISM.—*Vide* MINOR.

CERTIORARI.—*Vide* SUMMARY CONVICTIONS.

CERTIORARI.—APPEAL.

Held:—That a judgment of the Superior Court rendered on a writ of *Certiorari* is a final judgment; and that, in the case submitted, no appeal from such judgment lies to the Court of Queen's Bench, as constituted in Lower Canada.

Jugé:—Qu'un jugement de la Cour Supérieure sur un writ de *Certiorari* est un jugement final et en dernier ressort; et que, dans l'espèce, il n'y a pas appel de tel jugement à la Cour du Banc de la Reine, telle que constituée dans le Bas-Canada.

Boston and Lelièvre.

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CIRCUIT COURT JURISDICTION.—*Vide* ALIMENTARY ALLOWANCE. COMMUNAUTÉ.—*Vide* HUSBAND, LIABILITY OF, FOR DEBTS OF WIFE. COMMUNITY, EXCLUSION OF.—SEPARATION DE BIENS CONTRACTUELLE.

Held:—That the stipulation of exclusion of community in a marriage contract, does not give the wife the same rights as a *séparation de biens contractuelle*; and that an opposition *afin de distraire* made by a woman under such circumstances, cannot have the effect of preventing the sale of her moveable effects, seized for a debt contracted by the husband during the marriage.

Jugé:—Que la seule clause d'exclusion de communauté dans un contrat de mariage, ne donne pas à une femme mariée les mêmes droits qu'une séparation de biens contractuelle; et qu'une opposition *afin de distraire* faite par une femme sous de telles circonstances, ne peut avoir l'effet d'empêcher la vente de ses meubles, saisis pour une dette contractée par son mari durant le mariage.

Vézina vs. Denis, and Descareau.

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COMPLAINTE ET RÉINTÉGRANDE.—DAMAGES.

Held:—That an individual in possession of a lot of land in a township, for more than a year and a day, may bring an action *en complainte et réintégrande* against a person who enters upon such land merely for the purpose of cutting firewood thereon; and that, in such case, it is not necessary that the action brought should be simply an action in damages.

Jugé:—Qu'il est loisible à un individu en possession d'un lot de terre dans un canton, *township*, depuis plus d'un an et jour, de porter l'action en complainte et réintégrande contre une personne qui est entrée sur telle propriété seulement pour y couper du bois de chauffage; et que, dans pareil cas, il n'est pas nécessaire que l'action portée soit l'action simplement en dommage.

Vallée and Pacaud.

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COMPOSITION.—FRAUD.—NULLITY.

The plaintiff signed a composition deed between the defendant and his creditors, agreeing to receive 7s. 6d. in the pound, which were paid; and after signing the deed took a note from the defendant for a sum equal to 5s. in the pound additional, upon which note the action was brought.

Le demandeur signa un acte d'attribution entre le défendeur et ses créanciers, consentant à recevoir 7s. 6d. dans le louis, qui furent payés; après l'exécution de cet acte le demandeur obtint du défendeur un billet équivalant à 5s. dans le louis de plus, sur lequel billet l'action était portée.

The defendant invoked the nullity of the note as fraudulent and void.

Held:—That the case of Green-shields and Plamondon must be taken as establishing the doctrine that a note so given was not void as being in fraud-of creditors, or from any nullité d'ordre public.

Le défendeur invoqua la nullité de ce billet comme frauduleux et nul.

Jugé :—Que la cause de Green-shields et Plamondon doit être regardée comme établissant la doctrine qu'un billet ainsi donné n'est pas nul comme frauduleux envers les créanciers, ou en raison d'aucune nullité d'ordre public.

Perrault vs. Laurin.

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CONSIGNEE.—*Vide* DELIVERY.

CONTRACT.—*Vide* EXPERTS.

CONTRAT DE MARIAGE.—*Vide* AMEUBLISSEMENT.

CONTRAT SYNALLAGMATIQUE.—*Vide* SOUS SEING PRIVE'.

CONTRACT FOR WORK AND LABOR.—PLEADINGS.—ARTICULATION OF FACTS.

Held, in the Court below :—That, in the case of an undertaking by a contractor to do work in his own name, as well as in the name of another who never ratified the contract, and never participated in its execution, an action for the price of the work may be brought in the name of the two persons named in the deed as having undertaken to do the work.

In the Court of Appeals :— That, notwithstanding the exception pleaded in relation to the want of ratification and the absence of interest of the plaintiff who had not participated in the contract, the recognition of this plaintiff by the defendant, by the terms of the *articulation de faits* of the defendant, invalidated his exception.

Jugé, en Cour de première instance :—Qu'un bail d'ouvrage ayant été fait par un ouvrier entrepreneur, tant en son nom qu'au nom d'un autre qui n'a jamais ratifié le bail, et n'y a aucunement participé, l'action pour le prix des ouvrages faits peut être valablement portée au nom des deux personnes désignées en l'acte comme entreprenant l'ouvrage.

En Cour d'Appel :—Que, nonobstant l'exception plaidée relativement au défaut de ratification et d'intérêt de celui des demandeurs qui n'avait pas accédé au bail, la reconnaissance de ce demandeur par le défendeur, résultant des termes de son articulation de faits, met l'exception au néant.

Newcomb and Grant.

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COPARTNERSHIP, DISSOLUTION OF.

Held:— That a copartnership formed for the working of a threshing mill among the copartners, is dissolved by the death of one of them, and that the representatives of the deceased partner have a right to require that the mill be sold, or that the other partners pay them the value of the deceased partner's share.

Jugé :—Qu'une société formée pour l'usage et exploitation privée d'un moulin à battre, est dissoute par la mort d'un des associés, et que les représentants du défunt ont droit d'en demander la vente, ou que les autres associés leur paient la valeur de la part qu'y avait l'associé décédé.

Aubry vs. Denis.

97

CORPORATION.—*Vide* DAMAGES, LIABILITY FOR.
CORRECTION, RIGHT OF,—*Vide* TEACHER.

COSTS.—*Vide* FIXTURES.—PRACTICE.—PRIVILEGE.

CROWN LANDS.—LOCATION TICKET.—JUDGMENT IN VACATION.

Held, in the Superior Court :—That a location ticket or license of occupation signed by a local Crown Lands agent, confers no right on the holder of such ticket to maintain the actions referred to in Con. Stat. of Canada, chap. 22, sect. 13, inasmuch as by the said section it is enacted that : “ The commissioner of Crown Lands may issue, under his hand and seal such licenses, &c. ”

In Appeal :—That a judgment rendered in the Superior Court, out of term, will be reversed, if the Court was not adjourned to the day when such judgment was rendered.

Lanigan and Gareau.

CROWN PROPERTY.—QUEBEC TURNPIKE ROAD TRUSTEES.

Held :—That the Quebec North Shore Turnpike Road Trustees, are the agents of the Crown, and that moveable or immoveable property held by them belongs to and is vested in the Crown.

Anderson vs. The Quebec North Shore Turnpike Road Trustees and The Quebec Bank.

CURATORSHIP.—HUSBAND AND WIFE.

Held :—That the appointment of a wife, as curatrix to her interdicted husband, necessarily contains the authorisation to administer the estate of her husband as well as her own.

LeMesurier vs. Leahy.

CUSTOM HOUSE OFFICER.—SEIZURE.—DAMAGES.

Held :—That an officer of Customs who, in making a seizure of certain prohibited effects by the Customs laws, has caused the taking away of other effects the nature of which he could not determine, without a prolonged examination, is not responsible for damages resulting in consequence of the seizure of these last mentioned effects.

Saunders vs. Barry.

Jugé, dans la Cour Supérieure :—Qu'un billet de location ou licence d'occupation, signé par un agent local, ne confère aucun droit sur celui auquel il est accordé pour maintenir les actions auxquelles il est référé dans le Stat. Con. du Canada, chap. 22, sec. 13, en autant que par la dite section il est statué que : “ Le commissaire des Terres de la Couronne pourra émaner, sous son seing et sceau, &c. ”

En Appel :—Qu'un jugement rendu dans la Cour Supérieure, en vacance, sera infirmé, si la Cour n'était pas ajournée au jour où tel jugement a été rendu.

Jugé :—Que les Syndics des Chemins à barrières de la Rive du Nord, sont les agents de la Couronne, et que les meubles ou immeubles possédés par eux appartiennent à et sont la propriété de la Couronne.

Jugé :—Que la nomination d'une femme, comme curatrice à son mari interdit, contient nécessairement l'autorisation d'administrer les biens de son mari aussi bien que les siens.

Jugé :—Qu'un officier de douane qui, en pratiquant la saisie de certains effets prohibés par les lois de douane, a fait enlever d'autres articles dont il ne pouvait déterminer la nature, sans un examen prolongé, ne peut être responsable des dommages résultant de la saisie de ces derniers effets.

21

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370

CUSTOMS LAWS.—IMPORTATION.—EVIDENCE.

Held :—That upon seizure of certain articles containing indecent pictures and engravings, as imported into this province in contravention to the customs laws, it is not necessary that the fact of importation be proved ; but that the importation will be presumed unless the contrary be proved.

Jugé :—Que sur saisie de certains articles contenant des gravures et représentations indécentes, comme importés en cette province en contravention aux lois des douanes, il n'est pas nécessaire que le fait de l'importation soit prouvé ; mais que l'importation est présumée à moins de preuve contraire.

Regina vs. A Quantity of Jewellery and Saunders.

367

DAMAGES.—*Vide* COMPLAINTE ET REINTEGRANDE.—CUSTOM HOUSE OFFICER.—JURY TRIAL.—LOCATEURS ET LOCATAIRES.—RAILWAY COMPANIES.—TEACHERS.—WINTER ROADS.

DAMAGES.—ARCHITECTS.—CARPENTERS, LIABILITY OF,

1. The respondent employed architects to plan and superintend alterations to certain stores in the City of Montreal ; the appellants contracted to do the carpenters' work ; the floors sank from one to two inches after the completion of the works, and after the appellants had been paid. By the plans of the architects the joists provided were insufficient to support the floorings :

L'Intimé employa des architectes pour faire un plan de certains changements à des magasins dans la Cité de Montréal et pour en surveiller l'exécution ; les appellants entreprirent la menuiserie ; les planchers callèrent d'un à deux pouces après les ouvrages complétés, et que les appelants eussent été payés. D'après les plans des architectes les soliveaux étaient insuffisants pour porter les planchers.

Held :—That the architects and carpenters were liable, *in solido*, and could be sued in the same action for damages claimed by the respondent, by reason of the sinking of the floors.

Jugé :—Que les architectes et menuisiers étaient responsables, *in solido*, et pouvaient être poursuivis dans une même action pour les dommages réclamés par l'intimé, en raison de l'insuffisance des soliveaux.

McDonald and David.

31

Agricultural Act.—Experts.

2. Held :—On appeal to the Circuit Court from a judgment rendered by justices of the peace under the agricultural act :

Jugé :—Sur appel à la Cour de Circuit d'un jugement rendu par des juges de paix en vertu de l'acte d'agriculture :

1o. That, in the case submitted, under the provisions of this act, the justices had no jurisdiction to decide upon the amount of damages suffered.

1o. Que, dans l'espèce, sous les dispositions de cet acte, les juges de paix n'avaient aucune juridiction pour décider sur le montant des dommages soufferts.

2o. That such damages must be determined by *experts* to whom alone the statute has given the required authority.

2o. Que tels dommages doivent être constatés par des experts auxquels seuls le statut a conféré l'autorité requise.

3o. That the Court on such appeal will take cognizance, *ex officio*, of the commission appointing justices of the peace, as shewing the place of residence of the justices who rendered the decision appealed from.

3o. Que la Cour sur tel appel prendra connaissance, *ex-officio*, de la commission nommant les juges de paix, comme constatant la résidence de ceux qui ont rendu le jugement dont était appel.

St Gemmes dit Beauvais and Cherrier.

82

Corporations, Liability of.

3. Held:—1o. That the Corporation of the City of Montreal is liable for damage caused to goods stored in a cellar forming part of the premises leased to the plaintiffs, in consequence of the choking of a shaft in one of the public drains under the charge of the Corporation, thereby causing the water to flow back into the cellar through the private drain.

2o. That the cost of hiring other storage for the goods, will be included in the damage awarded, and is not a damage too remote to be recovered.

Jugé:—1o. Que la Corporation de la Cité de Montréal, est responsable pour dommage causé à des effets emmagasinés dans une cave formant partie de lieux loués aux demandeurs, en conséquence de l'engorgement d'un puit dans un des canaux publics aux soins de la Corporation, les eaux, en conséquence, refluant dans la cave par le canal privé.

2o. Que les frais de louage d'autres lieux pour l'emmagasinage des effets, seront inclus dans les dommages accordés, ces dommages n'étant pas le résultat d'une cause trop éloignée.

The Mayor, Aldermen and Citizens of the City of Montreal and Mitchell.

437

Search Warrant.—Evidence.

4. Held:—That in an action of damages for the issuing of a search warrant, without probable cause, the allegation of the absence of any probable cause, is sufficient, and will entitle the plaintiff to a judgment, unless the defendant prove that such probable cause did actually exist.

Jugé:—Que dans une action en dommages pour l'émission d'un warrant de recherche, sans cause probable, l'allégation de l'absence d'aucune cause probable est suffisante, et le demandeur devra obtenir jugement, à moins que le défendeur n'établisse que telle cause probable existait.

Mimandre vs. Allard.

154

*DEBTOR AND CREDITOR.—Vide GARNISHEE.**DECRET.—CANON EMPHYTEOTIQUE.*

Held:—That immoveable property sold by *décret* is freed from all incumbrances with which it was theretofore charged, except such as are clearly expressed in the sheriff's advertisement or notice of sale; and that, in the case submitted, the property sold having been twice leased for a term of years, subject to a *canon emphytéotique* under each lease, and the first lease only having been adverted to in the notice of sale, the property sold was released from the charges affecting it under the second lease.

Jugé:—Qu'une propriété immobilière vendue par décret est purgée de toutes charges dont elle était déchargée avant, excepté celles qui sont expressément énoncées dans l'avertissement du shérif ou avis de vente; et que, dans l'espèce, la propriété vendue ayant été deux fois louée pour plusieurs années, sujette à un canon emphytéotique en vertu de chaque bail, et le premier bail seul ayant été mentionné dans l'avertissement, la propriété vendue était purgée des charges qui l'affectaient en vertu du second bail.

Tétu vs. Chinic.

147

DELAY.—Vide VENDOR AND VENDEE.

DELIVERY.—CONSIGNEE.

Held :—1o. That a consignee of goods, on board ship, cannot insist upon such goods being delivered upon a lighter, provided by himself, before payment of the freight due to the carrier required to make such delivery.

2o. That in the case of a ship coming from a foreign port, the landing of goods, after due notice, at a wharf, where such goods are usually landed, is a good delivery.

3o. That if, in such case, the owner of the goods wilfully refuse to take charge of them, and that they are injured by the inclemency of the weather, he must bear the loss himself.

Jugé :—1o. Que le consignataire d'effets sur un vaisseau, ne peut insister à ce que ses effets lui soient livrés sur un allège fourni par lui-même, avant paiement du fret dû au messenger requis de faire telle livraison.

2o. Que dans le cas d'un vaisseau arrivant d'un port étranger, le déchargement des effets, après avis donné, sur un quai, où tels effets sont ordinairement déchargés, est une livraison valable.

3o. Que si, en pareil cas, le propriétaire des effets refuse de les recevoir, et qu'ils soient endommagés par les intempéries de l'air, il devra lui-même en supporter la perte.

Juson and Aylward and Vice-Versa.

164

DEMURRER.—Vide PLEADINGS.

DENONCIATION DE NOUVEL ŒUVRE.—Vide PUBLIC NUISANCE.

DON MANUEL.—Vide WILL.

DROIT DE PASSAGE.—Vide SERVITUDE.

ENQUETE.—Vide EXAMINATION OF PARTIES.—FIXTURES.—PRACTICE.

EVIDENCE.—Vide Customs LAWS.—DAMAGES.—EXAMINATION OF PARTIES.—MARRIAGE, NULLITY OF.

EXAMINATION OF PARTIES.—ENQUETE.—PRACTICE.

1. Held :—That the declaration of a party to a suit, that he intends to make use of the deposition of the adverse party examined as a witness in the case, will be rejected on motion, if it appears by affidavit, that although dated and filed as if during the *enquête*, it was, nevertheless, made and filed after *enquête* closed.

Beaudry vs. Ouimet.

Jugé :—Que la déclaration d'une partie à un procès, qu'elle entend se servir de la déposition de la partie adverse, examinée comme témoin dans la cause, sera rejetée sur motion, s'il appert par affidavit, que quoique datée et produite comme à l'enquête, cette déclaration, néanmoins, avait été faite après l'enquête close.

Husband and Wife.—Evidence.

2. Held.—That under the 14th and 15th sections of the Con. Stat. of L. C. Cap. 82, a defendant sued personally, and as authorising his wife, who was also a defendant, may be examined as a witness on behalf of the plaintiff.

Jugé.—Que sous les dispositions des 14me et 15me secs. du Stat. Ref. du B. C. cap. 82, un défendeur poursuivi personnellement, et comme autorisant sa femme, défenderesse à l'action avec lui, peut être examiné comme témoin de la part du demandeur.

Dillon vs. Harrison.

96

EXAMINATION OF WITNESSES.—*Vide* ASSIGNMENT.EXECUTION.—*Vide* GARNISHEE.EXPERTS.—*Vide* DAMAGES.—LICITATION.

EXPERTS.—CONTRACT.—WORK AND LABOR.

Held:—1o. That where, in an action by a carpenter for work and labor, the defendant pleaded that the work was done under a verbal contract and for a fixed sum, the Court ought not to send the case to *experts* or arbitrators to decide as to the existence or non-existence of the contract.

2o. That, without consent of parties, the Superior Court has no power to refer a cause to arbitrators, *amiables compositeurs*.

3o. That a judgment homologating an award of arbitrators named without such consent, and condemning the defendant to pay the amount mentioned in the award, will be reversed with costs.

Jugé:—1o. Que lorsque, dans une action par un menuisier pour ouvrages faits, le défendeur a plaidé que les ouvrages avaient été faits en vertu d'un contrat verbal et pour un prix fixe, la Cour ne devra pas renvoyer la cause à des experts ou arbitres pour décider quant à l'existence ou non existence du contrat.

2o. Que, sans consentement des parties, la Cour Supérieure ne peut référer une cause à des arbitres, *amiables compositeurs*.

3o. Qu'un jugement homologuant une sentence d'arbitres nommés sans tel consentement, et condamnant le défendeur à payer le montant mentionné dans la sentence, sera infirmé avec dépens.

Dunn and Bissonette.

403

FEES.—*Vide* RETURN OF WRIT.FENCES.—*Vide* RAILWAY COMPANIES.—WINTER ROADS.FIDELCOMMIS.—*Vide* SUBSTITUTION.FINE.—*Vide* VOTER.

FIXTURES.—ARTICULATION OF FACTS.—COSTS.—ENQUETE.

Held:—1o. That gas and water-pipes are fixtures, but may be removed, at the expiration of his lease, by the tenant who has fitted them up.

2o. That the sale of a house, with its appurtenances and dependencies, will include the gas and water-pipes, then fitted up in the same, unless specially reserved by the vendor.

3o. That a party failing to produce an articulation of facts, must, even in the event of success, bear the expense of his *enquête*.

Jugé:—1o. Que les tuyaux à l'eau et au gaz sont *fixtures*, mais peuvent être emportés par le locataire qui les a posés, à l'expiration de son bail.

2o. Que la vente d'une maison, avec ses circonstances et dépendances, inclura les tuyaux à l'eau et au gaz qui sont fixés pour demeure, à moins de réserves spéciales de la part du vendeur.

3o. Qu'une partie faisant défaut de produire une articulation de faits, devra, même dans le cas où elle réussirait, supporter les frais de son *enquête*.

Atkinson vs. Noad.

159

● FRAUD.—*Vide* ASSIGNMENT.—COMPOSITION.

FRAUD.—SALE.

Held :—That a sale of real estate made by the son to the father, will be declared simulated and fraudulent, and will be set aside, at the instance of creditors, notwithstanding proof of payment of the price of sale, upon sufficient evidence that the father had no pecuniary means.

McGrath and O'Connor.

Jugé :—Qu'une vente d'immeuble faite par le fils à son père, sera déclarée simulée et frauduleuse, et sera mise au néant, à la demande de créanciers, nonobstant la preuve de numération du prix, s'il y a preuve suffisante du défaut de moyens pécuniaires du père.

393

GARNISHEE.—DEBTOR AND CREDITOR.

1. Held :—That a creditor cannot recover against his debtor, if the latter has been condemned as garnishee in another case in which the creditor was defendant; and this more especially when he has commenced to satisfy the judgment rendered against him as such garnishee.

Parent vs. Talbot.

Jugé :—Qu'un créancier ne peut obtenir jugement contre son débiteur, lorsque ce dernier a été condamné comme tiers-saisi dans une autre cause où le créancier était défendeur; et surtout quand le tiers-saisi a commencé à satisfaire au jugement rendu contre lui.

127

Execution.

2. Held :—That, when a plaintiff, who has obtained judgment against a garnishee, neglects or refuses to enforce payment from the garnishee, the defendant will be empowered to cause the issuing of a writ of execution for the levying of the amount due by the garnishee, which amount will be held by the sheriff subject to the order of the plaintiff.

The Quebec Bank vs. Stuart, and The Quebec Fire Insurance Company.

Jugé :—Que lorsqu'un demandeur, qui a obtenu jugement contre un tiers-saisi, néglige ou refuse de contraindre le tiers-saisi à payer, le défendeur sera autorisé à poursuivre l'émanation d'un writ d'exécution pour prélever le montant dû par tel tiers-saisi, lequel montant restera entre les mains du shérif sujet à l'ordre du demandeur.

101

Witness, Taxation of.

3. Held :—1^o That the amount allowed by way of taxation to a garnishee is recoverable by suit at law.

2^o That a garnishee or witness is not entitled to take legal proceedings for the recovery of his taxation without having previously demanded payment.

Brunelle vs. Samson.

Jugé : 1^o Que le montant accordé sous forme de taxe à un tiers-saisi peut être recouvré par action.

2^o Qu'un tiers-saisi ou un témoin n'a pas le droit de procéder pour le recouvrement de sa taxe avant d'en avoir préalablement fait la demande.

12

GUARDIAN.—*Vide* SHERIFF.HIGH CONSTABLE.—*Vide* SEIZURE, EXEMPTIONS FROM.HUSBAND AND WIFE.—*Vide* CURATORSHIP.—EXAMINATION OF PARTIES.—PROMISSORY NOTE.

HUSBAND AND WIFE.—COMMUNAUTÉ.

1. Held : That the husband, where legal community exists, is not liable for debts incurred by the wife in the maintenance of a separate establishment from her husband, if she has voluntarily left his domicile without legal cause.

Jugé :—Que le mari, dans le cas de communauté légale, n'est pas responsable des dettes contractées par la femme pour le maintien d'un établissement séparé de celui de son mari, si elle s'est volontairement absentée de son domicile sans cause légale.

Morkill vs. Jackson.

181

Séparation de Biens.—Mortgage.

2. A husband and wife, *communs en biens*, undertook by notarial obligation to pay the plaintiff a sum of money acknowledged to have been lent and advanced "to them," without any expression of *solidarité*, and to secure the payment of the debt a mortgage was given upon certain real estate, a *propre* of the wife:

Un mari et une femme, *communs en biens*, entreprirent par obligation notariée de payer au demandeur une somme d'argent reconnue leur avoir été prêtée, il n'était rien dit quant à la solidarité entr'eux, et pour assurer la dette une hypothèque fut créée sur certain immeuble, propre de la femme.

Held :—In an action against husband and wife, that the wife having subsequently obtained a separation of property from her husband, and duly executed the judgment, she had become free from her obligation, and the land discharged from the mortgage, by reason of such judgment, and of the clause of the Registry Ordinance, 4 Vic. cap. 30, sect. 36.

Jugé :—Dans une action contre le mari et la femme, que la femme ayant subséquentement obtenu une séparation de biens d'avec son mari, et dûment exécuté le jugement, elle était libérée de l'obligation, et l'immeuble déchargé de l'hypothèque, et ce en raison de tel jugement, et de la clause de l'ordonnance des enregistrements, 4 Vic., cap. 30, sec. 36.

Byrnes vs. Trudeau.

17

Separation de Biens.—Promissory Note.

3. Held :—1o. That, in the case submitted, a woman will not be held responsible, after the death of her husband, for a note made by her without his authority, and without proof that the *séparation de corps et de biens* obtained by her had been executed.

Jugé :—1o. Que, dans l'espèce, une femme ne peut être tenue responsable, après le décès de son mari, d'un billet qu'elle a consenti sans son autorisation, et sans preuve que la séparation de corps et de biens obtenue contre lui eût été exécutée.

2o. That, likewise, she cannot be made to pay for merchandize purchased under similar circumstances, and in the absence of proof that the effects were necessary for her maintenance.

2o. Qu'elle ne peut être non plus tenue au paiement d'un compte de marchandises reçues dans les mêmes circonstances, et en l'absence de preuve que telles marchandises étaient nécessaires pour son entretien.

Dauziger and Ritchie.

425

HYPOTHEQUE.—*Vide* ANEUBLEMENT.

HYPOTHECARY ACTION.—ASSIGNEE.—NOTIFICATION.

Held:—1o. That in an hypothecary action brought by a plaintiff, *cessionnaire* of a debt, the signification of the action on the defendant, *tiers détenteur*, cannot be held as a signification of the transfer to the principal debtor.

2o. That where a plaintiff brings his action as upon a debt due and payable, and it appears from the *titres de créance* produced by himself that the debt is not due, (*exigible*) the action cannot be maintained.

3o. That by the jurisprudence of Lower Canada, the *cessionnaire* of a debt may maintain an action against the debtor without a previous signification to him of the *acte* of transfer.

Jugé:—1o. Que dans une action hypothécaire portée par un demandeur, *cessionnaire* d'une dette, la signification de l'action au défendeur, *tiers détenteur*, ne peut être considérée comme signification du transport au débiteur principal.

2o. Que lorsqu'un demandeur porte son action comme sur une dette due et exigible, et il appert des *titres de créance* produits par lui-même que la dette n'est pas exigible, l'action ne pourra être maintenue.

3o. Que par la jurisprudence du Bas-Canada, le *cessionnaire* d'une dette peut porter son action contre le débiteur sans signification préalable de l'*acte* de transport.

Aylwin and Judah.

421

IMPORTATION.—*Vide* CUSTOMS LAWS.INDORSER.—*Vide* PROMISSORY NOTE.INSCRIPTIONS.—*Vide* PRACTICE.

INSCRIPTION DE FAUX.—WILL.

Held:—That, in the case submitted, the *moyens* relied upon on an *inscription en faux* against a will, were not sufficiently established to procure the setting aside of the will and of the copy produced.

Bousquet vs. Renois.

Jugé:—Que, dans l'espèce, les *moyens* invoqués sur inscription en faux contre un testament n'étaient pas suffisamment justifiés pour faire mettre de côté la minute du testament et l'expédition produite.

381

INSOLVENCY.—*Vide* PROMISSORY NOTE.

INSURANCE.—WARRANTY.

Held:—That, in the case submitted, there was an express guarantee that the steamer insured should navigate, and that the insurers were not answerable for the loss suffered by the burning of the boat while kept lying in a dock.

Grant and The Equitable Fire Insurance Company.

Jugé:—Que, dans l'espèce, il y avait garantie expresse que le bateau à vapeur assuré serait employé à naviguer, et que les assureurs n'étaient pas tenus de dommages causés par l'incendie du bateau, pendant qu'il était dans un bassin.

493

JUDGMENT IN VACATION.—*Vide* CROWN LANDS.JURAT.—*Vide* AFFIDAVIT.JURISDICTION.—*Vide* CAUSE OF ACTION.—RESCISION DE BAIL.—VETER.

JURISDICTION.—APPEALS.—TAXES.

1. Held:—1o. That the Superior Court has jurisdiction, as a Court of Appeals, from judgments of the Recorder's Court, relating to taxes imposed by the Corporation of the City of Quebec, under its by-laws.

2o. That when a party holding a property used for special purposes, such as brewing, has been taxed at more than the actual value of his premises, owing to the increased value given them by the business carried on therein, he cannot be further taxed on the annual revenue of his business.

Jugé:—1o. Que la Cour Supérieure a juridiction, comme Cour d'Appel, des jugements de la Cour du Recorder, relativement aux taxes imposées par la Corporation de la Cité de Québec, en vertu de ses règlements.

2o. Que lorsqu'une personne possédant une propriété destinée à un objet spécial, tel qu'une brasserie, a été taxée à plus que la valeur actuelle de sa propriété, en conséquence de la valeur additionnelle qu'elle acquiert par le négoce que l'on y fait, elle ne peut-être taxée en sus sur le revenu annuel de tel négoce.

Boswell and The Mayor and Citizens of the City of Quebec. 450

Cause of Action.

2. Held:—That where a defendant was sued for a *prix de vente* of a land situated in the district in which the action was commenced, and service was made upon the defendant at his domicile, within another district, in which also the deed of sale was passed; the Court has no jurisdiction, the cause of action having arisen in another district.

Jugé:—Que dans le cas d'un défendeur poursuivi pour le prix de vente d'une terre située dans le district où l'action a été commencée, et la signification faite au défendeur dans un autre district, où il avait son domicile, et dans lequel l'acte de vente avait été exécuté; la Cour n'a pas juridiction, la cause d'action ayant originé dans un autre district.

Gauthier vs. Gratton.

442

JURY TRIAL.—DAMAGES.—PERSONAL WRONGS.

Held:—That in an action by a plaintiff against his father in law, for harboring the plaintiff's wife and refusing to send her back to the plaintiff's domicile, the action was substantially an action of damages for personal wrongs, and that, therefore, the defendant was entitled to demand a trial by Jury.

Jugé:—Que dans une action par un demandeur contre son beau-père, pour avoir reçu la femme du demandeur et avoir refusé de la renvoyer au domicile du demandeur, l'action était de fait une action en dommages pour injures personnelles, et que, partant, le défendeur avait le droit à un procès par jurés.

Conte vs. Garceau.

446

LICITATION.—PARTAGE.—EXPERTS.

Held:—1o. That in an action *en licitation*, the plaintiff, the proprietor of one half, having concluded for a *partage* between himself and the two defendants, the co-proprietors of the other half, the defendants having separately acquiesced in

Jugé:—1o. Que dans une action *en licitation*, le demandeur, propriétaire d'une moitié, ayant conclu à un partage entre lui et les deux défendeurs, les co-propriétaires de l'autre moitié, les défendeurs ayant séparément acquiescé à ces conclu-

these conclusions, and a judgment having been rendered in accordance therewith, the *experts* appointed to establish the divisibility or otherwise of the property, must confine themselves to reporting whether the property can or cannot be divided into two portions, the question of a further division between the defendants not having been raised.

2o. That in such action, where two *experts* have been appointed to report on the divisibility or otherwise of a property, and where they have not agreed in the *expertise*, one reporting the property divisible, and the other indivisible, the appointment of a third *expert* by the Court, *nommé d'office*, to decide between them must be made.

Lloyd and Boswell.

sions, et un jugement ayant été rendu en conformité à icelles, les experts nommés pour constater la divisibilité ou l'indivisibilité de la propriété, doivent seulement faire rapport savoir si la propriété peut ou ne peut être divisée en deux portions, la question d'une division ultérieure entre les défendeurs n'ayant pas été soulevée.

2o. Que dans telle action, lorsque deux experts ont été nommés pour faire rapport sur la divisibilité ou l'indivisibilité d'une propriété, et dans le cas où ils ne se sont pas accordés sur l'expertise, l'un rapportant que la propriété est divisible, et l'autre qu'elle est indivisible, la nomination d'un tiers expert par la Cour, *nommé d'office*, est nécessaire afin de les départager.

274

LOCATEURS ET LOCATAIRES.—*Vide* RESCISION DE BAIL.

LOCATEURS ET LOCATAIRES — DAMAGES.

Held :—That the proprietor of a house leased to several leasees, is not responsible for the damages which one of the leasees may suffer by reason of the *actes* or *voies de fait* of another of the said leasees.

Boily vs. Vézina.

Jugé :—Que le propriétaire d'une maison louée à plusieurs locataires, n'est pas responsable des dommages que l'un de ses locataires peut souffrir des actes ou voies de fait d'un autre des dits locataires.

325

LOCATION TICKET.—*Vide* CROWN LANDS.

MARCHANDE PUBLIQUE.—*Vide* MINOR.

MARRIAGE, NULLITY OF.—EVIDENCE.—ACTION.

Held, in the Superior Court :—That, in the case submitted, there was evidence of the first marriage of one Liscom, in the United States, and that a second marriage contracted in Canada, before the decease of the first wife, was absolutely null, although there did not appear any bad faith on the part of the second wife, who was not entitled to claim any matrimonial rights by the form of action which she had adopted.

In appeal :—That the action of the plaintiff, the second wife, could not be maintained against the res-

Jugé, par la Cour Supérieure :—Que, dans l'espèce, il y avait preuve d'un premier mariage du nommé Liscom, aux États-Unis, et qu'un second mariage par lui contracté en Canada, avant le décès de la première femme, était absolument nul, quoiqu'il n'apparaissait d'aucune mauvaise foi de la part de la seconde femme, laquelle ne pouvait réclamer de droits matrimoniaux par la forme d'action qu'elle avait adoptée.

En appel :—Que l'action de la demanderesse, la seconde femme, ne pouvait procéder contre l'inti-

pondent, in her quality of tutrix, the minor whom she represented being neither the heir or universal legatee of the husband, but only a particular legatee.

Fisher and Gareau.

mée, es qualité de tutrice, le mineur qu'elle représentait n'étant ni héritier, ni légataire universel du mari défunt, mais seulement légataire particulier.

372

MINES.—VENDOR AND VENDEE.—PERCENTAGE.—REDDITION DE COMPTE.

Held :—1o. That where in a deed of sale of certain lots of land in consideration of a certain sum paid down, and " of the further payment " to be made forever thereafter, to " the vendor, of the one tenth part " of all net profits to result after " deduction of losses and charges of " all mining operations, as the " purchaser shall carry on in and " upon the said lots, the same to be " ascertained to the 31st day of " December, yearly ; and to be duly " accounted for and paid over with- " in the six month next following ; " such *percentage* is payable, not only on mining operations by the purchaser individually, and alone, but also on all mining operations carried on by him in conjunction with others, or in which he was, or was to be, interested.

2o. That an account rendered allowing only to the plaintiff, as representing the vendor, one tenth of the profits realised by the defendant personally from the mines, without regard to the amount realized or retained by a lessee or person actually working or carrying on the mines, is contrary to the meaning of the clause referred to, and that a new account will be ordered.

Davies and Cushing.

Jugé :—1o. Que lorsque dans un contrat de vente de certains lots de terres en considération d'une certaine somme payée, et " en outre du paiement ci-après et a toujours, au vendeur, de la dixième partie des profits nets après déduction des pertes et charges résultant de tous travaux de mines, que l'acquéreur fera sur tous les dits lots, lesquels profits seront constatés le 31 décembre de chaque année, et desquels il sera rendu compte et iceux payés dans les six mois ensuivants ; " tels profits sont payables, non seulement sur les travaux de mines faits par l'acquéreur individuellement, mais encore sur tous travaux de mines faits par lui conjointement avec d'autres, et dans lesquels il devait être, ou était, intéressé.

2o. Qu'un compte rendu allouant seulement au demandeur, comme représentant le vendeur, un dixième des profits réalisés sur les mines par le défendeur individuellement, sans égard au montant réalisé ou retenu par un locataire ou une personne faisant les travaux des mines, est contraire au sens de la clause ci-dessus citée, et il sera ordonné une nouvelle reddition de compte.

288

MINOR.—MARCHANDE PUBLIQUE.—CERTIFICATE OF BAPTISM.

Held :—1o. That no action can be maintained against a woman who is a minor, and not a *marchande publique*.

2o. That the production of a certificate of baptism of a party to a suit, purporting to be signed by a parish priest in Ireland, will be taken as sufficient evidence of the baptism ; and that the insertion of

Jugé :—1o. Qu'aucune action ne peut être portée contre une fille mineure, si elle n'est *marchande publique*.

2o. Que la production d'un extrait baptistaire de l'une des parties à un procès, dit avoir été signé par un curé en Irlande, sera considéré comme preuve suffisante du baptême ; et que la mention " de la

the "quality, occupation and place of abode of the father," required by the Cons. Stat. of L. C., chap. 20, sect. 5, is not requisite in such certificate.

qualité ou occupation du père et lieu de sa demeure," voulue par le Stat. Ref. du B. C., cap. 20, sec. 5, n'est pas requise en pareil cas.

Féron vs. Donelly.

50

MORTGAGE.—*Vide* HUSBAND AND WIFE.

MUNICIPAL COUNCILS.—APPEALS.—NOTICE OF SECURITY.

Held:—1o. That the Municipal Council of a county, and the Corporation of the same county, are one and the same.

2o. That, in the case submitted, the delays within which the service of the bail bond and petition must be made, are not on pain of nullity.

Jugé:—1o. Que le Conseil Municipal d'un comté, et la Corporation de ce même comté, sont une seule et même personne.

2o. Que, dans l'espèce, les délais dans lesquels la signification du cautionnement et de la requête doit être faite, ne sont pas à peine de nullité.

Rhœume and La Corporation du Comté de Lotbinière.

444

NAVIGABLE RIVERS.—*Vide* PUBLIC NUISANCE.

NOTES OF EVIDENCE IN CRIMINAL CASES.—*Vide* WAIT OF ERROR.

NOTICE OF SECURITY.—*Vide* MUNICIPAL COUNCILS.

NOTIFICATION.—*Vide* HYPOTHECARY ACTION.

NULLITY.—*Vide* COMPOSITION.

OPPOSITION.—*Vide* REQUÊTE CIVILE.

PARTAGE.—*Vide* ACTION EN REINTEGRANDE.

PARTAGE.—PREScription.

Held:—That a partition between parties of full age succeeding to an estate, made during the life-time of the first *substitué*, cannot be set aside after the lapse of ten years and more by reason; 1o. of the absence of the nomination of a tutor *ad hoc* to the substitution; 2o. by reason of the absence of any valuation of the immovables *partagés*; 3o. of the substitution in favor of the *co-partageants* not being open at the period of the partition; and 4o. of the *lésion du tiers au quart*; the co-partitioners having had possession of the estate, at least of a portion, during the life-time of the *premier grevé*.

Guy and Guy.

Jugé:—Qu'un partage entre majeurs appelés à une succession, et grevés eux-mêmes, fait du vivant du premier substitué, ne peut-être mis au néant après un laps de plus de dix ans sous prétexte; 1o. du défaut de nomination d'un tuteur à la substitution; 2o. de l'absence d'évaluation des biens *partagés*; 3o. de la non ouverture de la substitution en faveur des *co-partageants* au temps du partage; et 4o. de lésion du tiers au quart; les *co-partageants* ayant en la possession des biens, du moins en partie, pendant la vie du premier grevé.

229

PASSAGE.—*Vide* PUBLIC PROPERTY.
 PERCENTAGE.—*Vide* MINES.
 PERSONAL WRONGS.—*Vide* JURY TRIAL.
 PILOTS.—PILOTAGE.

Held:—1o. That the master of every vessel leaving the port of Quebec, for any port out of this Province, or arriving in the port of Quebec, from any port out of the Province, is bound to receive on board a Branch Pilot, and to give him charge of his vessel while within the pilotage limits.

2o. That a Branch Pilot is not entitled to receive charge of a vessel arriving within the port of Quebec, unless he shall have shewn, by signal or otherwise, his intention to board the vessel and take charge thereof.

Exparte Chrysler in Simard vs. Chrysler, and Exparte Chrysler in The Corporation of Pilots vs. Chrysler.

209

PLEADINGS.—*Vide* ACTION IN EJECTMENT.—AFFIDAVIT.—CONTRACT FOR WORK AND LABOR.—PRACTICE.—REPORT OF DISTRIBUTION, CONTESTATION OF.—REQUETE CIVILE.

PLEADINGS.—SAISIE-ARRÊT.—DEMURRER.

Held:—1o. On a special answer in law, that a portion of a plea to an action commenced by *saisie-arret*, on notes not matured, by which the defendant denied the *déconfiture* and seclusion of effects set up in the affidavit for attachment, and alleged that he had continued to take up the notes as they became due, and that the action was vexatious and unfounded, and prayed that the affidavit be declared to be unwarranted, and that the attachment be set aside, will be dismissed as irregularly pleaded.

2o. That these matters should be pleaded by preliminary exception as *nullités d'exploit*, and not by a plea to the merits.

3o. That an answer in law, or demur, to a portion of a plea will be maintained as being consistent with the practice of the Court, although in the opinion of the Judge, the proper course was to move for the rejection of the objectionable parts of the plea.

Jugé:—1o. Que le capitaine de tout vaisseau laissant le port de Québec, pour un port en dehors de cette Province, ou arrivant dans le port de Québec, d'aucun port en dehors de la Province, est tenu de recevoir à son bord un pilote licencié, et de lui remettre la charge de son vaisseau pendant qu'il est dans les limites prescrites.

2o. Qu'un pilote licencié n'a pas droit de recevoir la charge d'un vaisseau arrivant dans le port de Québec, à moins qu'il n'ait indiqué, par signal ou autrement, son intention de monter à bord tel vaisseau et d'en prendre charge.

Jugé:—1o. Sur une réponse spéciale en droit, que partie d'un plaider à une action commencée par une saisie-arret, sur billet promissaire non encore dû, par lequel le défendeur niait la déconfiture et le recèlement de ses effets allégués dans l'affidavit, et alléguait qu'il avait continué à retirer ses billets à leur échéance, et que l'action était vexatoire, et concluant à ce que l'affidavit fut déclaré non fondé, et la saisie mise de côté, sera renvoyée comme irrégulièrement plaidée.

2o. Que ces matières devaient être plaidées par une exception préliminaire comme nullités d'exploit, et non par un plaider au mérite.

3o. Qu'une défense au fonds en droit, ou *demurrer*, à partie d'un plaider sera maintenue en autant que cette pratique avait été suivie par la Cour, quoique dans l'opinion du Juge, une motion eût dû être faite pour rejeter la partie du plaider qui était illégale.

Chapman vs. Nimmo, and The Phoenix Assurance Co.

103

POSSESSION.—*Vide* PRESCRIPTION.PRACTICE.—*Vide* EXAMINATION OF PARTIES.

PRACTICE.—COSTS.—PLEADINGS.

1. Held:—1o. That a motion to stay proceedings, because the plaintiff has failed to pay the costs on a former action which he has withdrawn, will not be granted.

2o. That an objection of this nature, being by statute a *fin de non recevoir*, must be taken advantage of by a plea to the action

Lambert vs. Bergeron.

Jugé:—1o. Qu'une motion pour suspendre la procédure, parce que le demandeur a fait défaut de payer les frais d'une première action qu'il a retirée, ne sera pas accordée.

2o. Qu'une pareille objection étant par le statut une fin de non recevoir, doit être présentée par un plaidoyer à l'action.

413

Enquêtes.

2. Held:—That the Court, on cause shewn, will discharge a case from the roll for hearing on the merits, and permit the *enquête* to be reopened for the examination of a witness, and will also permit the plaintiff to file his declaration that he intends to make use of the defendant's deposition, notwithstanding that a declaration to that effect, previously made, had been rejected from the record, on the defendant's motion, as irregularly filed.

Beaudry vs. Ouimet.

Jugé:—Que la Cour, pour cause suffisante, rayera une cause du rôle de droit pour être entendue aux mérites, et permettra que l'enquête soit rouverte pour l'examen d'un témoin, et permettra aussi au demandeur de produire sa déclaration qu'il entend se servir de la déposition du défendeur, nonobstant qu'une déclaration à cet effet, faite antérieurement, eût été rejetée du record, sur motion du défendeur, comme irrégulièrement produite.

449

Enquêtes.

3. Held:—That to inscribe for *enquêtes* and final hearing on the merits, the party so inscribing must have notified his adversary of his option so to inscribe, previous to the inscription for *enquêtes* alone.

Wood vs. Swinburne.

Jugé:—Que pour inscrire pour enquête et audition finale aux mérites, la partie inscrivant ainsi doit avoir donné avis à son adversaire de son choix d'inscrire ainsi, avant l'inscription aux enquêtes seulement.

152

Pleadings.—Inscription.

4. Held:—That under the terms of the 51st rule of practice, it is necessary that in the inscription upon the *rôle de droit* for hearing upon the pleadings, the day upon which such hearing will take place be indicated, as well as in the notice thereof; without which such inscription will be declared null, and the cause struck from the roll.

Evanturel vs. Evanturel.

Jugé:—Qu'aux termes de la 51e règle de pratique, il est nécessaire que dans l'inscription sur le rôle de droit pour audition en droit sur les plaidoyers, le jour auquel telle audition aura lieu soit indiqué, ainsi que dans l'avis d'icelle; sans quoi telle inscription sera déclarée nulle, et la cause sera rayée du rôle.

151

PRESCRIPTION.—Vide PARTAGE.—PROMISSORY NOTE.

PRESCRIPTION.—BAILIFFS.

1. Held:—That bailiffs are "officers of justice," whose fees are prescribed by three years.

Hib:rt vs. Pentland.

Jugé:—Que les huissiers sont "officiers de justice," dont les honoraires se prescrivent par trois ans.

155

Possession.

2. Held:—That on a contestation by the plaintiff of an opposition by which the opposant claimed the land seized in the cause, as proprietor, the plaintiff is not entitled to invoke the possession of the defendant to whom he sold the land, in order to make up the ten years possession and prescription, under the 115th article of the Custom of Paris.

Ruiter vs. Thibadeau, and Torrance.

306

PRIVILEGE.—Costs.

1. Held:—That a plaintiff who has procured the sale of the effects of a defendant under a writ of execution, is not entitled to be paid out of the proceeds of such sale, the full amount of the costs incurred by him upon contestation of his action, the costs for which he has a privilege being only the costs as in an action decided upon the merits *ex parte*, with *enquête*.

Alford and The Mayor, Councillors and Citizens of the City of Quebec.

Jugé:—Qu'un demandeur qui a fait vendre les effets d'un défendeur, en vertu d'un writ d'exécution, n'a pas le droit d'être payé sur le produit de telle vente, tous les frais encourus par lui sur contestation de son action; les frais pour lesquels il a un privilège n'étant que les frais comme dans une action jugée aux mérites *ex parte*, avec *enquête*.

143

Registration.

2. Held:—That a party who has advanced monies for the erection of a *mitoyen* wall between himself and his neighbor, cannot upon sale by *décret* of the neighboring property, claim a privilege or preference to the hypothecary creditors upon such property, if he has not observed the formalities prescribed by the registry law, cap. 37, Con. Stat. of Lower-Canada, sec. 26, sub-sec. 4, and this notwithstanding that the value of the property has been increased by the erection of such wall.

Stillings vs. McGillis, and Coveney.

Jugé:—Qu'un individu qui a avancé des deniers pour la construction d'un mur mitoyen, entre lui et son voisin, ne pourra réclamer un privilège, sur vente par décret de l'héritage voisin, à l'encontre des créanciers hypothécaires sur tel héritage, s'il n'a observé les formalités voulues par la loi des enregistrements, cap. 37, Stat. Ref. du Bas-Canada, sec. 26, sous-sec. 4, et ce quoique la valeur de l'héritage ait été augmentée par la construction de tel mur.

129

PROMISSORY NOTE.—*Vide* HUSBAND AND WIFE.

PROMISSORY NOTE.—INDORSER.—INSOLVENCY.

1. Held:—That a promissory note, not yet due, endorsed by a party who has since become bankrupt, does not entitle the holder to be paid *au marc la livre* concurrently with the other creditors of the bankrupt, the term of payment not having expired.

/ Mailloux vs. Audet dit Lapointe,

Jugé:—Qu'un billet promissoire non encore dû, endossé par un individu, depuis devenu insolvable, ne met pas le porteur en droit d'être payé au marc la livre avec les autres créanciers de l'endosseur insolvable, le terme de paiement n'étant pas encore échu.

and Mailloux and Carrier. 207

Prescription.

2. Held:—That the five years prescription of a Promissory Note, under 12 Vict., chap. 22, sect. 31, is not interrupted by the defendant's absence of seven or eight years from Canada.

Darah vs. Church.

Jugé:—Que la prescription de cinq ans contre un billet promissoire, en vertu de la 12 Vict., cap. 22, sec. 31, n'est pas interrompue par l'absence du défendeur du Canada pendant sept ou huit ans.

295

Protest, Notice of.—*Husband and Wife.*

3. Held:—That, in the case submitted, the husband, universal legatee of his wife, for whom he had endorsed a promissory note, was bound to pay the amount of the note, notwithstanding there was no protest, the Court considering it was sufficiently established that he had consented, in the name of his wife, that there should be no protest, to avoid costs, and that, in fact, the wife was only a *prête-nom* to cover the trading of the husband.

Bériaux and McCorkill.

Jugé:—Que, dans l'espèce, le mari, légataire universel de sa femme, pour laquelle il avait endossé un billet promissoire, était tenu au paiement du montant du billet, nonobstant le défaut de protêt, la Cour considérant qu'il était suffisamment prouvé qu'il avait consenti à l'omission du protêt, au nom de sa femme, pour éviter des frais, et que de fait, la femme n'était qu'un *prête-nom* pour couvrir le commerce du mari.

400

PROTEST, NOTICE OF.—*Vide* PROMISSORY NOTE.

PUBLIC NUISANCE.—NAVIGABLE RIVERS.—DENONCIATION DE

NOUVEL ŒUVRE.

Held:—1o. That obstructions to navigable rivers are public nuisances, and that no action by an individual lies for such nuisance, unless such individual suffers special and particular damage.

2o. That, in the case submitted, the action *en dénonciation de nouvel œuvre* did not lie, inasmuch as such action can only be brought by

Jugé:—1o. Que les obstructions aux rivières navigables sont incommodes publiques, et qu'aucune action par un individu ne peut être intentée en raison de telles incommodes, à moins que tel individu ne souffre quelque dommage spécial.

2o. Que, dans l'espèce, l'action en dénonciation de nouvel œuvre ne compétait pas, en autant que telle action ne peut être intentée que

a party claiming protection against a work commenced, and still in progress, by which, if completed, he alleges he will be injured.

par une personne réclamant contre des travaux commencés, et encore en progrès, par lesquels il allègue qu'il souffrira dommage s'ils sont complétés.

Brown and Gugsy.

213

PUBLIC PROPERTY.—SEKKT. —PASSAGE.

Held:—That, in the case submitted, in the absence of direct evidence of a particular title, a lane or passage recognised as such, and open during thirty years, and more, will be considered public property, although no title or *procès-verbal* establishes that it is such public property.

Jugé:—Que, dans l'espèce, en l'absence de preuve directe d'un titre particulier exclusif, une ruelle ou passage reconnu et ouvert pendant plus de trente ans, est censée propriété publique, quoiqu'aucun titre ou *procès-verbal* n'établisse que telle propriété soit propriété publique.

Johnson and Archambault.

222

QUEBEC TURNPIKE ROAD. TRUSTEES.—Vide CROWN PROPERTY.

RATIFICATION.—Vide ASSIGNMENT.

RAILWAY COMPANIES.—DAMAGES.

1. Held:—1o. That a railway Company is responsible for damages suffered by a party, in consequence of the cutting of certain line ditches by the Company in the building of their road; which line ditches served to carry away the waters, the *surplus* waters being thereby made to flow into a water course upon the land of the plaintiff, which land, in consequence of the insufficiency of the water course to carry off such *surplus* waters, was inundated.

Jugé:—1o. Qu'une Compagnie de chemin de fer est responsable des dommages soufferts par un individu, en raison de ce que par la construction de son chemin, la Compagnie a coupé certains fossés de ligne qui servaient auparavant à l'écoulement des eaux, et par cela porté le surplus des eaux dans un cours d'eau sur la terre du demandeur, laquelle, par l'insuffisance de tel cours d'eau à porter le surplus de ces eaux, a été inondée.

2o. That, in such case, the rule of law which says: "That he who in the construction of any work upon his property, uses his right without violating any law, or usage, or title, or contrary possession, is not held for the damage resulting therefrom;" is not applicable.

2o. Qu'en pareil cas, la règle de droit qui dit que: "Celui qui, faisant un nouvel œuvre sur sa propriété, use de son droit sans blesser, ni loi, ni usage, ni titre, ni possession contraire, n'est pas tenu du dommage qui pourra arriver;" n'est pas applicable.

The Grand Trunk Railway Company of Canada and Miville dit Deschène.

469

Fences.

2. Held:—1o. That the obligation of the Company to fence the track, is a duty towards the adjoining owners, and that the Company, in the absence of negligence, is not liable for injuries to cattle unlaw-

Jugé:—1o. Que l'obligation de la Compagnie de clore la voie ferrée, ne s'étend qu'au propriétaire voisin, et que la Compagnie, lorsqu'il n'y a pas de négligence de sa part, n'est pas responsable du dommage

fully on the adjoining close, and thence straying on the track, notwithstanding it had not complied with the statute requirements.

20. That, in the case submitted, there was no negligence in the Company.

Roux dit Sanschagrain vs. La Compagnie du Grand Tronc de Chemin de Fer du Canada. 140

Liability of.—Fences.—Cattle.

3. Held:—That, in the case submitted, the appellants could not be made responsible for the loss of horses killed upon their track, without proof of neglect on their part, either in the conducting of their trains, or in the maintaining of their fences; the company moreover being under no obligation to make such fences secure against horses—horses not being comprised under the term *Cattle*.

causé à des animaux venant d'une propriété qui n'est pas contigue au chemin de fer, nonobstant qu'elle ne se soit pas conformée aux dispositions du statut.

20. Que, dans l'espèce, il n'y avait pas négligence de la part de la Compagnie.

Jugé:—Que, dans l'espèce, les appellants ne pouvaient être responsables de la perte de chevaux tués sur leur chemin, en l'absence de preuve de négligence de leur part, soit dans la conduite des trains, ou dans l'entretien des clôtures; la compagnie n'étant pas d'ailleurs obligée de faire telles clôtures à l'épreuve de chevaux, qui ne sont pas compris sous la désignation de *Bestiaux*.

The Champlain and St. Lawrence Railway Compy. and Simard.

406

RECONCILIATION.—*Vide SLANDER.*

REDDITION DE COMPTE.—*Vide MINES.*

REGISTRATION.—*Vide PRIVILEGE.*

REPORT OF DISTRIBUTION, CONTESTATION OF.—PLEADINGS.

Held:—10. That the contestation of a report of distribution and collocation, is a pleading in the nature of a demurrer, *défense au fonds en droit*, under which no matter of fact can be inquired into.

20. That, in the case submitted, the contestation resting upon matters of fact, the parties contesting ought to have pleaded to the opposition.

Jugé:—10. Que la contestation d'un rapport de distribution et de collocation, est une procédure de la nature d'une défense au fonds en droit, sous laquelle l'on ne peut s'enquérir d'aucun fait.

20. Que, dans l'espèce, la contestation reposant sur des matières de fait, les parties contestant eussent dû plaider à l'opposition.

Dorion vs. Grant, and Patterson

227

REQUETE CIVILE.—OPPOSITION.

Held:—That an opposition in the nature of a *requête civile* cannot be considered as such, if it be not so called, and if the opposant does not observe the formalities which are peculiar to the *requête civile*, and that the word *requête civile* is absolutely necessary in such proceeding.

Jugé:—Qu'une opposition de la nature d'une *requête civile* ne peut être considérée comme telle, si elle n'est pas ainsi appelée, et si l'opposant n'observe pas les formalités qui sont particulières à la *requête civile*, et que le mot *requête civile* est sacramental dans telle procédure.

Bilodeau vs. Martin, and Martin.

205

Proceedings on.—Pleadings.

2. Held:—1o. That the *requête civile* is a proceeding still in force in Lower Canada.

2o. That reasons which could be urged against an action or opposition by an exception to the form, may be opposed to a *requête civile* by a simple motion to set aside.

3o. That the permission of the Court is necessary for the production of a *requête civile*.

4o. That service of the *requête civile* must be made upon the party interested in contesting it.

Maguire vs. Stride, and Stride.

Jugé:—1o. Que la *requête civile* est une procédure encore en force dans le Bas-Canada.

2o. Que des moyens qui pourraient être opposés à une action ou à une opposition par une exception à la forme, peuvent être opposés à une *requête civile* au moyen d'une simple motion.

3o. Que la permission de la Cour est nécessaire pour la production d'une *requête civile*.

4o. Que signification d'une *requête civile* doit être faite à la partie qui a un intérêt à la contester.

105

RESCISION DE BAIL.—LOCATEURS ET LOCATAIRES—JURISDICTION.

Held:—That an action for the rescision of a lease only, without any demand for arrears of rent, or for damages, may be brought under the lessors and lessees act; and that the jurisdiction of the Court will be determined by the amount of the annual rent of the premises.

Jugé:—Qu'une action pour la simple rescision d'un bail, sans aucune demande pour arrérages de loyers, ou pour dommages, peut être portée en vertu de l'acte des locateurs et locataires; et que la juridiction de la Cour sera déterminée par le montant du loyer annuel des lieux.

Guy vs. Goudreault.

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RESIDUARY LEGATEE.—Vide BANK STOCK, TRANSMISSION OF.**RESILIATION.—Vide SALE.****RETURN.—Vide SHERIFF.****RETURN OF WRIT.—Vide ASSIGNMENT.****RETURN OF WRIT.—FEES.**

Held:—That the failure on the part of the plaintiff to pay the entrance fee on the day of the return of a writ, does not vitiate the return which has been made.

Jugé:—Que le défaut de la part du demandeur de payer l'honoraire d'entrée le jour du rapport d'un writ, ne vicie pas le rapport qui a été fait.

Lee vs. Kinsman.

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ROLL OF VALUATION, DEPOSIT OF.

Held:—That the valuation roll of a municipality must be deposited for revision within the limits of the municipality to which it refers.

Jugé:—Que le rôle des évaluations d'une municipalité doit être déposé pour révision dans les limites de la municipalité qu'il affecte.

Les Commissaires d'Ecoles pour la Municipalité scolaire de St. Roch de Québec Nord vs. Rousseau.

98

SAISIE-ARRÊT.—*Vide* AFFIDAVIT.—PERADINGS.SALE.—*Vide* FRAUD.

SALE.—VENDOR AND VENDEE.—RESILIATION.

Held :—That the purchaser of an immoveable, one half of which was possessed by the vendor simply *d titre d'usufruit*, may refuse payment of the price of sale, if he be threatened with eviction, and this without being obliged to accept the sureties offered by the vendor.

Monjeau and Dubuc.

Jugé :—Que l'acquéreur d'un immeuble, dont une moitié n'était possédée par le vendeur qu'à titre d'usufruit, peut refuser d'en payer le prix, et peut demander la résiliation de la vente, s'il est menacé d'éviction, sans être tenu d'accepter les cautions offertes par le vendeur.

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SEARCH WARRANT.—*Vide* DAMAGES.SECURITY.—*Vide* VENDOR AND VENDEE.SEIZURE.—*Vide* CUSTOM-HOUSE OFFICERS.

SEIZURE, EXEMPTIONS FROM.—HIGH CONSTABLE.

Held :—1o. That the high constable is not a recording officer, and is not obliged to have an office for the execution of his duties.

2o. That a seizure will not be set aside because it has been made within the limits of the Court House, but without the hall of the Court.

3o. That the Con. Stat. L. C., cap. 85, sec. 3, sub-sec. 6, is only applicable to the tools of tradesmen necessary to the exercise of their calling.

Bussiere vs. Faucher.

Jugé :—1o. Que le grand constable n'est pas un *recording officer*, et n'est pas obligé d'avoir un bureau pour les devoirs de sa charge.

2o. Qu'une saisie ne peut être annulée parce qu'elle aurait été faite dans les limites du Palais de Justice, en dehors de l'audience.

3o. Que le cap. 85, sec. 3, sous-sec. 6, des Stat. Ref. du B. C., ne s'applique qu'aux outils des ouvriers nécessaires à l'exercice de leur métier.

87

SÉPARATION DE BIENS.—*Vide* HUSBAND AND WIFE.SÉPARATION DE BIENS CONTRACTUELLE.—*Vide* COMMUNITY, EXCLUSION *et*.

SERVITUDE.—DROIT DE PASSAGE.

Held :—That the right of passage upon an estate to reach a property having no other means of ingress, is a legal service, a written title to which it is not necessary to produce, when it has been used for thirty years and more.

Rauger vs. Rauger, and Valois.

Jugé :—Que le droit de passage sur un héritage pour arriver à une enclave qui n'a pas d'autre voie d'accès, est une servitude légale dont il n'est pas nécessaire de produire un titre par écrit, lorsque la jouissance en a duré plus de trente ans.

134

SHERIFF.—GUARDIAN.—RETURN.

The sheriff, in his return to a writ of *saisie-arrest* issued in the year 1857, certified, "that he had attached in the hands of Edward Oliver, the defendant, a certain ship or vessel called the *Melbourne*," as mentioned in the *procès verbal* of seizure annexed to his return, and by the *procès verbal* it appeared that François Langlois and Jean Lachance, were the guardians.

Afterwards, in return to a writ of *venditioni exponas*, issued in the year 1860, in the same cause, the sheriff certified that the respondent had been appointed guardian, under the said writ of *saisie-arrest* so issued in 1857, but did not return the *procès-verbal* establishing the appointment of the respondent as guardian.

Held, in the Superior Court :—That the sheriff after his return of a writ of *saisie-arrest simple*, is *functus officio*, and can thereafter exercise no authority over the seizure made by him, not even to the appointing of a *gardien volontaire* in the stead of a *gardien à gages*.

In the Court of appeals :—1o. That it is no part of the official duty of a bailiff employed by the sheriff to return to the Court his doings under a warrant from the sheriff, and such return, if made to the Court, will be regarded as an unofficial act, and therefore not authentic.

2o. That the statement so made by the sheriff in his return to the writ of *venditioni exponas*, in the year 1860, was not legal evidence of the appointment of the respondent, as guardian under the writ of *saisie-arrest*.

Dinning and Oliver.

SLANDER.—RECONCILIATION.

Held :—That in a case of slander, the Court will not presume a reconciliation or abandonment of the right of action, by reason of the parties having drank together before the trial.

Pepin vs. Rocand dit Bastien.

Le shérif, par son retour à un writ de *saisie-arrest* émané en 1857, certifia, "qu'il avait saisi entre les mains d'Edward Oliver, le défendeur, un certain vaisseau appelé le *Melbourne*," tel que mentionné dans le *procès verbal* de saisie annexé à son rapport, et par le *procès verbal* il apparaissait que François Langlois et Jean Lachance, étaient les gardiens.

Subséquentement, sur rapport du *venditioni exponas*, émané en 1860, dans la même cause, le shérif certifia que l'intimé avait été nommé gardien, sous le dit writ de *saisie-arrest* ainsi émané en 1857, mais il ne fit pas rapport du *procès verbal* constatant la nomination de l'intimé comme gardien.

Jugé, dans la Cour Supérieure :—Que le shérif après son rapport d'un writ de *saisie-arrest simple*, est *functus officio*, et ne peut par après exercer aucune autorité sur la saisie pratiquée par lui, pas même quant à la nomination d'un *gardien volontaire* au lieu d'un *gardien à gages*.

Dans la Cour d'Appel :—1o. Qu'il n'appartient pas et qu'il n'est pas du devoir d'un huissier employé par le shérif de faire rapport à la Cour de ses procédés en vertu du warrant du shérif, et que si tel rapport est fait à la Cour, icelui sera considéré comme non officiel, et partant comme non authentique.

2o. Que l'énoncé ainsi fait par le shérif dans son rapport au writ de *venditioni exponas*, en 1860, ne constatait pas d'une manière légale la nomination de l'intimé, comme gardien en vertu du writ de *saisie-arrest*.

396

Jugé :—Que dans le cas d'injures verbales, la Cour ne présumera pas réconciliation ou abandon du droit d'action, de ce que les parties ont bu ensemble avant le procès.

364

SOUS SEING PRIVÉ.—CONTRAT SYNALLAGMATIQUE.

Held:—That a document *sous seing privé*, containing the stipulations of a *contrat synallagmatique* is valid, and that its production, to prove the reciprocal engagements of the parties thereto, is sufficient, although it be neither executed *en double*, or declared to have been so executed.

Jugé:—Qu'un document *sous seing privé*, contenant les stipulations d'un *contrat synallagmatique* est valide, et que sa production, pour constater les engagements réciproques des parties, est suffisante, quoiqu'il ne soit pas exécuté *en double*, ni allégué avoir été ainsi exécuté.

Lampson vs. McConnell.

44

SPECIAL BAIL.—CAPIAS.—BAIL BOND.

Held:—1o. That in case of arrest under *capias ad respondendum*, the defendant may put in special bail even after judgment rendered in the original suit, upon application to extend the delay for putting in such bail, and upon sufficient cause shewn.

Jugé:—1o. Que dans le cas d'arrestation en vertu de *capias ad respondendum*, le défendeur peut donner cautionnement spécial même après jugement rendu dans la cause, sur application pour prolonger le délai pour donner tel cautionnement, appuyée de raisons suffisantes.

2o. That the sureties of the defendant who have given bail for his appearance to the sheriff, have also, by law, the right, upon failure of the defendant so to do, to put in such special bail, upon application for that purpose, and upon sufficient cause being likewise shewn.

2o. Que les cautions du défenderr, qui ont fourni cautionnement pour sa comparution au shérif, ont aussi le droit, sur défaut du défendeur de ce faire, de donner cautionnement spécial, sur application pour cet objet, appuyée de même de raisons suffisantes.

3o. That the bond to be given by the special bail is the same as was required by "the laws of Lower Canada in force" before the passing of the 12th Vict., cap. 42, namely, by the 6th Geo. IV., cap. 2.

3o. Que le cautionnement qui doit être fourni par les cautions spéciales est le même que celui requis par les lois *en force* dans le Bas-Canada, avant la passation de la 12me Vic., cap. 42, savoir, par la 6me Geo. IV, cap. 2.

Sewell and Vannover.

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STREET.—*Vide* PUBLIC PROPERTY.SUBLETTING.—*Vide* ACTION EN RESILIATION.

SUBSTITUTION.—FIDEICOMMIS. - - -

Held:—1o. That, in the case submitted, the donation to the plaintiff created a substitution *fideicommissaire*.

Jugé:—1o. Que, dans l'espèce, la donation au demandeur contenait une substitution *fideicommissaire*.

2o. That a tutor to a substitution, impleaded in that capacity, represents all the *appelés* to the substitution in a case where such *appelés* are not mentioned by name in the instrument creating the substitution.

2o. Que le tuteur à une substitution, poursuivi en cette capacité, représente tous les *appelés* à la substitution dans le cas où tels *appelés* ne sont pas mentionnés nommément dans l'acte contenant la substitution.

3o. That the clause in the dona-

3o. Que la clause dans la dona-

tion permitting the alienation of the *fonds, à constitution de rente*, in case it were found by *experts* to be advantageous to the children of the donee, will be carried into effect by the Court on such report of *experts*, in an action by the donee praying to be authorized to sell, although the donee had no children, and was not likely to have any.

Castonguay and Castonguay.

tion permettant l'aliénation des fonds, à constitution de rente, dans le cas où il serait, sur expertise, trouvé avantageux aux enfants du donataire, sera mise à exécution par la Cour sur rapport d'experts, dans une action par le donataire concluant à être autorisé à vendre, quoiqu'il n'eût aucun enfant, et qu'il ne fût pas probable qu'il en aurait.

308

SUMMARY CONVICTIONS.—CERTIORARI.

Held:—1o. That the delay intervening between the service of a writ of summons issued from a magistrates' Court at three o'clock P. M., and the return of the writ on the following day at ten A. M., is insufficient, and that, under the circumstances of the case, the plaintiff could not legally proceed to judgment, *ex parte*, on the return day, the defendant not appearing.

2o. That a writ of *certiorari* will be granted to remove a conviction to the Superior Court, notwithstanding that the writ of *certiorari* is taken away by the statute under which the conviction was had.

Ex parte Church.

Jugé:—1o. Que le délai entre la signification d'une sommation émanée d'une Cour de juges de paix à trois heures de l'après-midi, et le rapport du writ le jour ensuivant à dix heures du matin, est insuffisant, et que, dans les circonstances de la cause, le demandeur ne pouvait pas procéder légalement à jugement, *ex parte*, le jour du rapport, le défendeur ne comparissant pas.

2o. Qu'un writ de *certiorari* sera accordé pour faire transmettre une conviction à la Cour Supérieure, nonobstant que le writ de *certiorari* soit prohibé par le statut en vertu duquel la conviction a eu lieu.

318

TAXATION, RECOVERY OF.—*Vide* GARNISHEE.

TAXES.—*Vide* JURISDICTION.

TEACHER.—CORRECTION, RIGHT OF.—DAMAGES.

Held:—That the right of correction given to the teacher, must only be exercised in cases of necessity, and only so far as it is in proportion to the offence and to the circumstances, and that the teacher will be subject to damages if he exceed these limits.

Brisson vs. Lafontaine dîte Surprenant.

Jugé:—Que le droit de correction accordé à l'instituteur, ne doit être exercé que dans les cas de nécessité, et seulement au degré proportionné à l'offense et aux circonstances, et que l'instituteur est passible de dommages-intérêts s'il excède ces bornes.

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TESTAMENTARY EXECUTOR.—ACTION.

Held:—1o. That an action, for a *dette mobilière*, will not lie against a testamentary executor alone, but that the heirs or other personal representatives of the testator, must be joined in the suit, although the executor was directed, by the will, to pay the debts; and although the

Jugé:—1o. Qu'une action pour une dette mobilière ne peut être portée contre un exécuteur testamentaire seul, mais que les héritiers ou autres représentants du testateur, doivent être mis en cause, quoique l'exécuteur soit, par le testament, chargé de payer les dettes;

action was commenced within the year of the death of the testator.

20. That the plea of the executor, "that he has no part of the estate of the testator in his hands," will be maintained, although the action be instituted within three months of the death of the testator.

Caspar vs. Hunter.

et qu'au moment où l'action soit commencée dans l'an du décès du testateur.

20. Que la défense de l'exécuteur, "qu'il n'a aucune partie de la succession du testateur entre ses mains," sera maintenue, quoique l'action soit portée dans les trois mois ensuivant le décès du testateur.

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TESTATOR.—*Vide* WILL.

VENDOR AND VENDEE.—*Vide* MINER.—SALE.

VENDOR AND VENDEE.—DELAY.—TENDER.

1. In the case of a sale of tea by auction, the conditions of which as announced were cash for purchases under \$100, payment at four months for purchases above that sum, upon giving paper satisfactory to the seller:

Held, in the Court below:—10. That the delay of four months only ran from the day of the delivery of the whole quantity.

20. That this condition was equivalent to a delay of four months, to be computed from the delivery of the whole quantity.

30. That the offer by the purchaser of a check on the Bank of Toronto, after action brought, but before the expiration of the delay of four months, for the price of the tea, without costs, was sufficient.

Held, in appeal:—That the delay of four months was conditional and could only be invoked upon furnishing to the seller satisfactory paper, which the purchaser had not done before action brought, and that the action, in consequence, ought to be maintained.

Young and Mullin.

Dans le cas d'une vente de thé par encan, dont les conditions annoncées étaient au comptant pour tout achat au-dessous de \$100, et à quatre mois au-dessus de cette somme, en fournissant un effet à la satisfaction du vendeur:

Jugé, en Cour de première instance:—10. Que le délai de quatre mois ne courait que du jour que la quantité entière avait été livrée.

20. Que cette condition équivalait à un délai de quatre mois pour le paiement, à compter de la livraison entière.

30. Que l'offre par l'acheteur d'un *check* sur la Banque de Toronto, après l'action intentée, mais avant l'expiration du délai de quatre mois, pour le prix du thé, sans frais, était valable.

Jugé, en appel:—Que le délai de quatre mois était conditionnel, et ne pouvait être invoqué qu'en fournissant un effet satisfaisant au vendeur, ce que l'acheteur n'avait pas fait avant l'action intentée, et que l'action, en conséquence, devait être maintenue.

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Security.

2. The purchaser of a lot of land, upon being sued for a balance of the *prix de vente*, alleged and proved that the land was originally granted by letters patent to A. B., and others, and was afterwards sold to the plaintiff without any warranty, except as to his own acts and deeds, by a person who failed to

L'acquéreur d'une pièce de terre, poursuivi pour la balance du prix de vente, alléguait et prouva que la terre avait été originairement concédée par lettres patentes à A. B., et autres, et subsequmment vendue au demandeur sans garantie, excepté quant à ses faits et promesses, par un individu qui n'avait

show any connection of titles between himself and the patentees, or any persons claiming through them :

Held :—That a purchaser so sued is not entitled to obtain from the plaintiff the security provided by the 23 Vic., chap. 59, sec. 18.

Hase vs. Messier.

VOTER.—FINE.—JURISDICTION.

Held :—1o. That the fine of \$200 imposed by the Consol. Stat. of Canada, chap. 6, sect. 60, for falsely assuming to vote in the name of a person whose name appears on the list of voters, cannot be recovered in a Court of Civil Jurisdiction.

2o. That the offence is made a misdemeanor, and can be tried only in a Criminal Court, and the fine imposed, on conviction, in such Court.

Barrette vs. Bernard.

WARRANTY.—Vide INSURANCE.

WILL.—Vide INSCRIPTION DE FAUX.

WILL.—BANK STOCK, TRANSMISSION OF.—DON MANUEL.

In an action against executors, it appeared that the deceased, on the 4th September, 1860, being then on his death bed, and having made his will in March previous, stated to his secretary, amongst other things, that he was a dying man, and requested him to write certain checks, payable to certain persons named, to whom he wished to give a token of his regard, and then signed the checks so written, which checks remained in the possession of the secretary until after his death.

On the 6th September, in presence of members of his family, and of certain of his friends, the deceased assented to the checks, when the names and amounts were read over to him at his request, and died the following day.

An action was brought by the plaintiff, an episcopal clergyman in the parish where the deceased resided, to recover the amount of one of the said checks, made in his favor for \$1000, which had been pre-

pu établir aucune connexité par titres entre lui et les concessionnaires originaux, ou entre aucunes autres personnes :

Jugé :—Qu'un acquéreur ainsi poursuivi n'a pas droit d'obtenir du demandeur le cautionnement pourvu par la 23 Vic., cap. 59, sec. 18.

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Jugé :—1o. Que l'amende imposée par le Stat. Ref. du Canada, chap. 6, sec. 60, pour avoir fausement voté au nom d'une personne dont le nom figure sur la liste des électeurs, ne peut être recouvrée dans une Cour de Jurisdiction Civile.

2o. Que l'offense est constituée un délit, et ne peut être poursuivie que devant une Cour Criminelle, et l'amende imposée, sur conviction, par telle Cour.

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Dans une action contre des exécuteurs testamentaires, il apparaissait que le défunt, le 4 septembre, 1860, étant alors sur son lit de mort, et ayant fait son testament dans le mois de mars auparavant, entra autres choses, dit à son secrétaire, qu'il se mourait, et le requit de remplir certains checks payables à certaines personnes auxquelles il désirait marquer son amitié, lesquels checks il signa et remit à son secrétaire pour les garder jusqu'après son décès.

Le 6 septembre, en présence des membres de sa famille, et de certains de ses amis, le défunt confirma ces checks quand les noms et les montants lui furent lus à sa réquisition, et il mourut le jour ensuivant.

Une action fut portée par le demandeur, un ministre de l'église épiscopale, dans la paroisse où le défunt résidait, pour le recouvrement du montant d'un de ces checks, fait en sa faveur pour \$1000, qui

sented at the Bank where it was made payable, and had been protested for non payment.

The defendants pleaded that the will of the deceased under which they were named executors, had never been revoked or altered; that there was no value or consideration for the check; and that at the date of the same, the deceased was laboring under disease of the brain, and was not of sound and disposing mind, but was incapable of contracting or disposing by last will:

Held, in the Superior Court:—1o. That at the time of the making of the said checks, and subsequently, the deceased was in a sound rational state of mind and understanding.

2o. That the plaintiff was entitled to recover as upon a *don manuel*, the delivery of the check to the secretary being, under all the circumstances, held to be an actual and immediate delivery, *tradition*, of the gift.

In the Court of Appeal:—1o. As above in respect to the mental capacity of the deceased.

2o. That the plaintiff was not entitled to recover as upon a *don manuel*, but that the check was valid and effectual as a testamentary bequest or disposition.

Cotville and Flanagan.

WINTER ROADS.—FENCES.—DAMAGES.

Held:—1o. That under "The Lower Canada Consolidated Municipal Act," a winter road was validly traced out and made across the plaintiff's lands without his consent, his fence, which was of stone laid up without mortar, being held to be a fence which could "without great difficulty or expence be removed or replaced."

2o. That an action of damages against the Inspector for so laying out the road, and against another who assisted in removing the fence, must, therefore, be dismissed.

Lavoie vs. Hbte.

avait été présenté à la banque où il était payable, et avait été protesté faute de paiement.

Les défendeurs plaidèrent que le testament du défunt, par lequel ils étaient nommés exécuteurs, n'avait jamais été révoqué ou changé; que le *check* n'était pas causé pour valeur ou considération; et qu'à la date d'icelui, le défunt souffrait d'une maladie du cerveau, et n'était pas sain d'esprit, mais était incapable de contracter ou de faire aucune disposition testamentaire:

Jugé, en Cour Supérieure:—1o. Qu'à l'époque où les dits *checks* furent faits, et subsequmment, le défunt était sain d'esprit et d'entendement.

2o. Que le demandeur était en droit de recouvrer, comme pour un don manuel, la livraison du *check* au secrétaire étant, dans les circonstances, jugée être une tradition actuelle et immédiate du don.

Dans la Cour d'Appel:—1o. Comme ci-dessus dit sous le rapport de la capacité mentale du défunt.

2o. Que le demandeur n'avait pas droit de recouvrer comme pour un don manuel, mais que le *check* était valide et bon comme legs ou disposition testamentaire.

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Jugé:—1o. Qu'en vertu de "L'acte Municipal Refondu du Bas-Canada," un chemin d'hiver avait été valablement tracé et fait sur les terrains du demandeur sans son consentement, sa clôture, qui était de pierre sans mortier, étant réputée être une clôture qui pouvait "être abattue ou replacée sans beaucoup de difficultés ou de grandes dépenses."

2o. Qu'une action en dommages contre l'inspecteur pour avoir tracé ce chemin, et contre un autre pour avoir assisté au déplacement de la clôture, doit, par conséquent, être renvoyée.

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WITNESS.—*Vide* GARNISHEE.WORK AND LABOR.—*Vide* EXPERTS.WRIT OF ERROR.—AMENDED RECORD.—NOTES OF EVIDENCE
IN CRIMINAL CASES.

In this case it was alleged that, in the course of the trial, a medical witness was ordered to make an analysis for the information of the jury, that he had done so, and made a report; but that the report so made, was not placed before the Jury, as it ought to have been, and that, thereby, the prisoner was deprived of the advantage of important evidence in his favour.

Held:—1o. That as the report could not have been submitted to the jury, except as part of the evidence, and, as neither the evidence, nor the rulings of the Judge in relation to it, can be brought under the consideration of the Court by a writ of error, that the plaintiff in error had not a right to have the record amended, so as to place before the Court the said report, and the entries in the Register of the Court below respecting it.

2o. That the plaintiff in error could not cause the record to be amended, so as to show whether the Judge who presided at the trial wrote the notes of the evidence himself, or caused these to be written by another person; nor so as to show what precautions were taken for the safe keeping of the Jury, whilst deliberating upon their verdict out of Court.

Duval dit Barbinau vs. Regina.

Dans cette cause il était allégué que, dans le cours du procès, il avait été enjoint à un témoin, médecin, de faire une analyse pour l'information du jury, qu'il s'était conformé à cet ordre, et avait fait son rapport; mais que le rapport ainsi fait, n'avait pas été soumis au jury, ce qui eut du être fait, et que par ce, le prisonnier avait été privé de l'avantage d'une preuve importante en sa faveur.

Jugé:—1o. Qu'en autant que le rapport n'eut pu être soumis au jury, excepté comme partie du témoignage, et, en autant que ni les témoignages, ni les décisions du Juge qui y avaient rapport, ne pouvaient être soumis à la considération de la Cour par un writ d'erreur, le demandeur en erreur n'avait pas le droit de faire amender le record, de manière à placer soit le dit rapport ou les entrées au registre de la Cour Inférieure qui y avaient rapport, devant cette Cour.

2o. Que le demandeur en erreur ne pouvait faire amender le record de manière à constater si le Juge qui présidait au procès avait pris notes des témoignages lui-même, ou les avait fait écrire par une autre personne; ni de manière à constater quelles précautions avaient été prises pour la garde du jury, pendant qu'ils délibéraient sur leur verdict hors de Cour.

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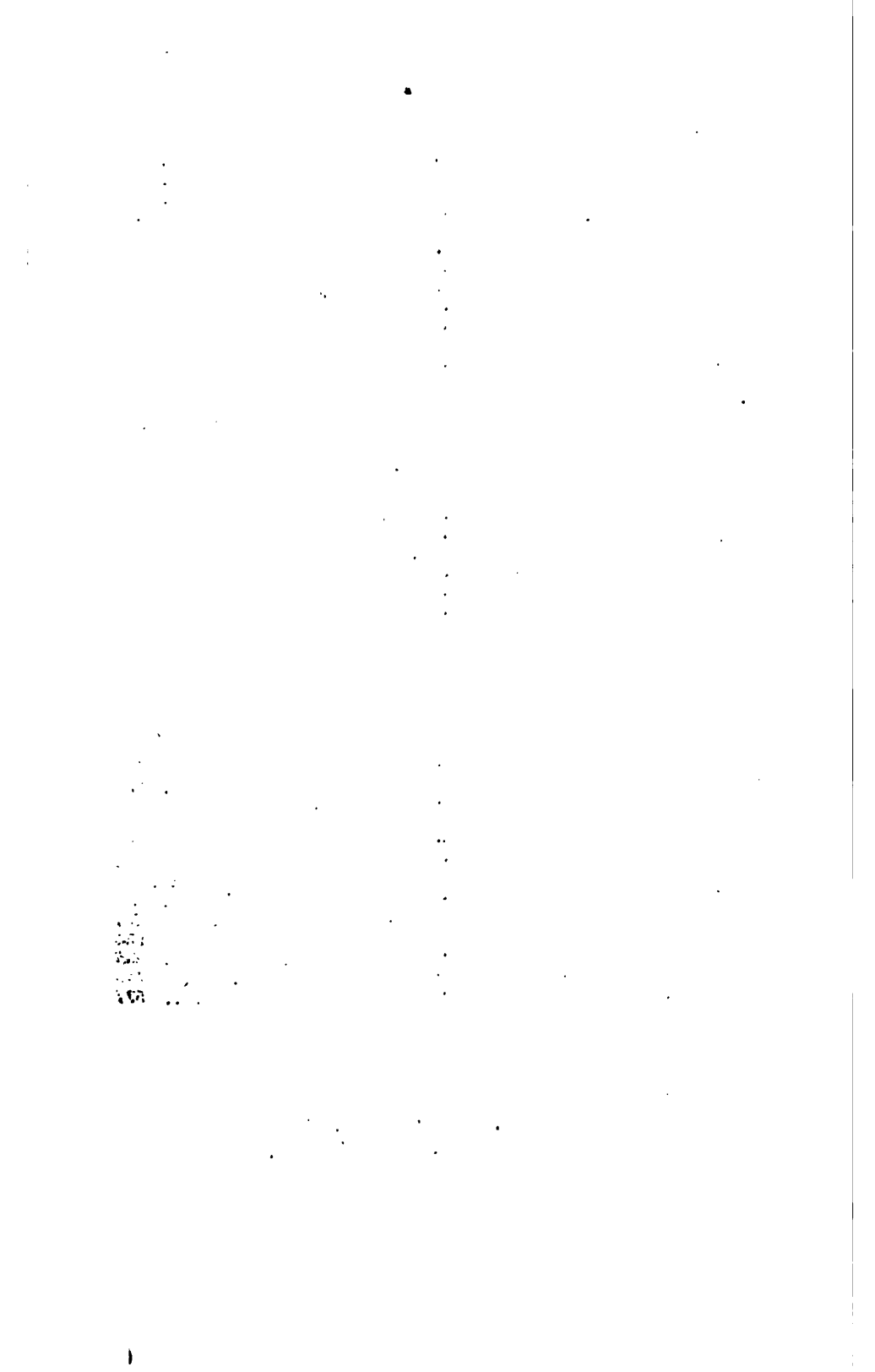
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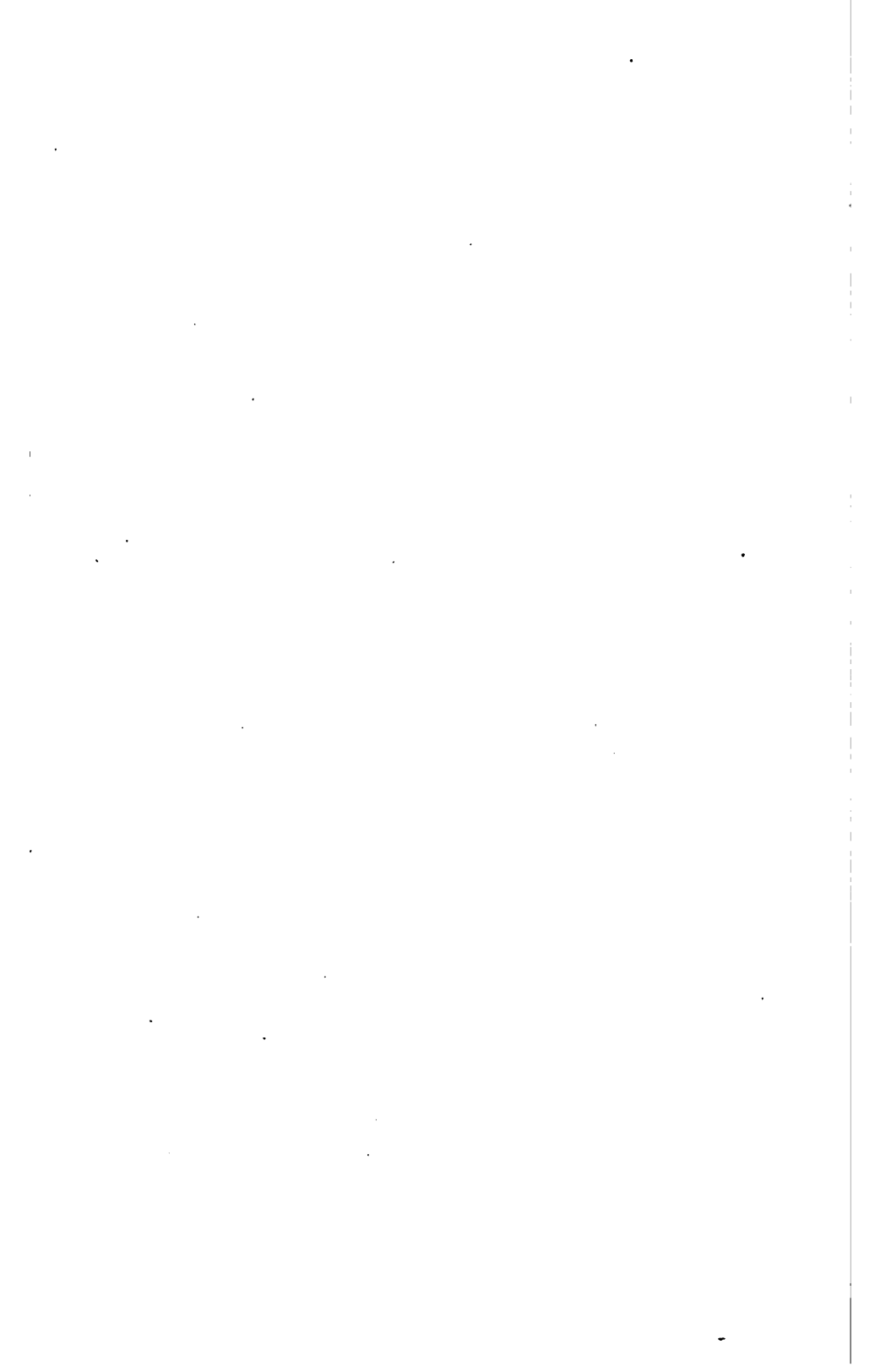
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